Selection of Leading Cases

For the use of B.L. Students

[*Published under the Authority of the University of Calcutta*]

LAW OF CONTRACTS AND TORTS

Published by the
University of Calcutta
1920

PRINTED BY ATULCHANDRA BHATTACHARYYA,
AT THE CALCUTTA UNIVERSITY PRESS, SENATE HOUSE, CALCUTTA.

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LAW OF CONTRACTS AND TORTS.

ASHBY

v.

WHITE ET ALIOS.

[*Reported in 1 Sm. L. C., 231 ; 2 Lord Raymond, 938 ; 3 ID ; 320.*]

1703.
January, 14

The following is the judgment of HOLT, CHIEF JUSTICE in this case.[1]

The single question in this case is, whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hindered to give it by the officer, an action on the case will lie against such officer ?

I am of opinion that judgment ought to be given in this case for the plaintiff. My brothers differ from me in opinion ; and they all differ from one another in the reasons of their opinion ; but notwithstanding their opinion, I think the plaintiff ought to recover and that this action is well maintainable, and ought to lie. I will consider their reasons. My brother Gould thinks no action will lie against the defendant, because, as he says, he is a Judge ; my brother Powys, indeed, says, he is no Judge, but *quasi* a Judge ; but my brother Powell is of opinion, that the defendant neither is a Judge, nor anything like a Judge, and that is true : for the defendant is only an officer to execute the precept, *i.e.*, only to give notice to the electors of the time and place of election, and to

[1] Lord Holt's argument has been more fully and lucidly set forth by himself in a manuscript which was first published in 1837, at the request of Lord Denman, under the title of "The Judgments of Lord Holt in the case of *Ashby* v. *White* and in the case of *John Patey* and others." This manuscript probably contains a revised form of the judgment prepared for use in the House of Lords ; see 1 Sm. L. C. p. 282, 10th Ed.

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assemble them together in order to elect, and upon the conclusion to cast up the poll, and declare which candidate has the majority.

But to proceed, I will do these two things: *First*, I will maintain that the plaintiff has a right and privilege to give his vote: *Secondly*, in consequence thereof, that if he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber, and that this is the proper action given by the law.

I did not at first think it would be any difficulty to prove that the plaintiff has a right to vote, nor necessary to maintain it, but from what my brothers have said in their arguments I find it will be necessary to prove it. It is not to be doubted, but that the commons of England have a great and considerable right in the Government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore, by the constitution of England, it has been directed that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the commons of England vested in them: and this representation is exercised in three different qualities, either as knights of shires, citizens of cities, or burgesses of boroughs; and these are the persons qualified to represent all the commons of England. The election of knights belongs to the free holders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from their freehold, than the freehold itself can be taken away. Before the statute of 8 Hen. 6, c. 7, any man that had a freehold, though never so small, had a right of voting, but by that statute the right of election is confined to such persons as have lands or tenements to the yearly value of forty shillings at least, because, as the statute says, of the tumults and disorders which happened at elections, by the excessive and outrageous number of electors; but still the right of election is an original right, incident to and inseparable from the freehold. As for citizens and burgesses, they depend on the same right as the knights of shires, and differ only as to the tenure, but the right and manner of their election is on the same foundation. Now, boroughs are of two

sorts: *first*, where the electors give their voices by reason of their burgership; or, *secondly*, by season of their being members of the corporation. Littleton in his chapter of tenure in burgage, 162, Co. Litt. 108b, 109, says: "Tenure in burgage is, where an ancient borough is, of the which the king is lord, of whom the tenants hold by certain rent, and it is but a tenure in socage"; and Sect. 164, he says, "and it is to wit, that the ancient towns, called boroughs, be the most ancient towns that be within England and are called boroughs, because of them come the burgesses to parliament." So that the tenure of burgage is from the antiquity, and their tenure in socage is the reason of their estate, and the right of election is annexed to their estate. So that it is part of the constitution of England, that these boroughs shall elect members to serve in parliament whether they be boroughs corporate or not corporate; and in that case the right of election is a privilege annexed to the burgage land, and is, as I may properly call it, a real privilege. But the second sort is, where a corporation is created by charter, or by prescription, and the members of the corporation, as such, choose burgesses to serve in parliament. The first sort have a right of choosing burgesses as a real right, but here in this last case it is a personal right, and not a real one, and is exercised in such a manner as the charter or custom prescribes; and the inheritance of this right, or the right of election itself, is in the whole body politic, but the exercise and enjoyment of this right is in the particular members. And when this right of election is granted within time of memory, it is a franchise that can be given only to a corporation; as is resolved by all the Judges, against my Lord Hobart, in the case of Dungannon in Ireland[1] that if the king grant to the inhabitants of Islington to be a free borough, and that the burgesses of the same town may elect two burgesses to serve in parliament, that[2] such a grant of such privilege to burgesses not incorporated is void, for the inhabitants have not capacity to take an inheritance. See Hob. 15. The principal case there was, the king constituted the town of Dungannon to be a free borough, and that the inhabitants thereof shall be a body politic and corporate, consisting of one provost, twelve free burgesses, and

[1] 12 Co., 120, 121.

[2] See, Co. Litt. 3a.

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commonalty; and in the same name may sue and be sued; *et quod ipsi præfatus præpositus et liberi burgenses burgi prædicti et successores sui in perpetuum habeant plenam potestatem et authoritatem eligendi, mittendi, et retornandi duos discretos et idoneos viros ad inserviendum et attendendum in quolibet parliamento, in dicto regno nostro Hiberniæ in posterum tenendo*; and so proceeds to give them power to treat, and give voice in parliament, as other burgesses of any other ancient borough, either in Ireland or England, have used to do. And upon this grant it was adjudged, by all the Judges of England, that this power to elect burgesses is an inheritance of which the provost and burgesses were not capable, for that it ought to be vested in the entire corporation, *viz.*, provost, burgesses, and commonalty, and that therefore the law in this case did vest that privilege in the whole corporation in point of interest, though the execution of it was committed to some persons, members of the same corporation.[1] As to the manner of election, every borough subsists on its own foundation, and where this privilege of election is used by particular persons, it is a particular right vested in every particular man; for if we consider the matter, it will appear that the particular members and electors, their persons, their estates, and their liberties are concerned in the laws that are made, and they are represented as particular persons, and not *quatenus* a body politic; therefore, when their particular rights and properties are to be bound (which are much more valuable perhaps than those of the corporation) by the act of the representative, he ought to represent the private persons. And this is evident from all the writs, which were anciently issued for levying the wages of the knights and burgesses that served in parliament. As 46 Edw. 3, *Ro. Parl. memb. 4 in dorso.* For when wages were paid to the members, they were not assessed upon the corporation, but upon the commonalty as private persons, as the writ shows, which is indeed directed to the sheriff, or to the mayor, etc., yet the command is '*quod de communitate comitatus civitatis vel burgi, habere, faciat militibus civibus aut burgensibus 10 l. pro expensis suis.*' But now, if the corporation were only to be represented, and not the particular members of it, then the corporation only ought to be at the charge; but it is plain that the particular members are at

[1] 12 Co., 120, 121; Hob., 14, 15.

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the charge. And this is no new thing, but agreeable to reason and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit of it to redound to the particular members, and to be enjoyed by them in their private capacity. As is the case of *Waller* and *Hanger*,[1] where the king granted to the mayor and citizens of London, *quod nulla prisagia sint soluta de vinis civium et liberorum hominum de London, &c.* And there it was resolved, that although the grant be to the corporation, yet it should not enure to the body politic of the city, but to the particular persons of the corporation, who should have the fruit and execution of the grant for their private wines, and it should not extend to the wines belonging to the body politic; and so is the constant experience at this day. So in the case of *Mellor* v. *Spateman*,[2] where the corporation of Derby claim common by prescription, and though the inheritance of the common be in the body politic, yet the particular members enjoy the fruit and benefit of it, and put in their own cattle to feed on the common, and not the cattle belonging to the corporation: but that is not indeed our case. But from hence it appears that every man, that is to give his vote on the election of members to serve in parliament, has a several and a particular right in his private capacity, as a citizen or burgess. And surely it cannot be said that this is so inconsiderable a right as to apply that maxim to it, *de minimis non curat lex.* A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in diverse statutes; as in the statute of 34 & 35 Hen. 8, c. 13, intituled an act for making of knights and burgesses within the county and city of Chester, where in the preamble it is said that "whereas the said county palatine of Chester, is, and hath been always hitherto, exempt, excluded, and separated, out and from the king's court, by reason whereof the said inhabitants have hitherto sustained manifold disherisons, losses, and damages, as well in their lands, goods, and bodies, as in good, civil, and politic

[1] Moo., 832, 833.
[2] 1 Saund., 343.

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governance and manintenance of the commonwealth of their said county." &c. So that the opinion of the parliament is that the want of this privilege occasions great loss and damage. And the same further appears from the 25 Car. 2, c. 9, an Act to enable the county palatine of Durham to send knights and burgesses to serve in parliament which recites, "whereas the inhabitants of the county palatine of Durham have not hitherto had the liberty and privilege of electing and sending any knights and burgesses to the high court of parliament," &c. The right of voting at the election of burgesses is a thing of the highest importance, and so great injury to deprive the plaintiff of it. These reasons have satisfied me to the first point.

2. If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy [1]; for want of right and want of remedy are reciprocal. As if a purchaser of an advowson in feesimple, before any presentment, suffer an usurpation, and six months to pass, without bringing his *quare impedit*, he [2] has lost his right to the advowson, because he has lost his *quare impedit*, which was his only remedy; for he [3] could not maintain a writ of right of advowson; and though he afterwards usurp and die, and the advowson descend to his heir; yet [4] the heir cannot be remitted, but the advowson is lost for ever without recovery. 6 Co. 50. Where a man has but one remedy to come at his right, if he loses that, he loses his right. It would look very strange, when the commons of England are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff or other officer to deprive them of that right, and yet that they should have no remedy; it is a thing to be admired at by all mankind. Supposing then that the plaintiff had a right of voting, and so it appears on the record, and the defendant has excluded him from it, nobody can say that the defendant has done well: then he must have done ill, for he has deprived the plaintiff of his right; so that the plaintiff

[1] D. acc. Co., 58b.
[2] See, now, 7 Ann. c. 18.
[3] See H. Bl. 1; Lit. s. 514; Co. Lit. 293 a.
[4] See 6 Co., 58.

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having a right to vote, and the defendant having hindered him of it, it is an injury to the plaintiff. Where a new Act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him. How else comes an action to be maintainable by the party on the statute of 2 Ric. 2, *de scandalis magnatum*, 12 Co. 134, but in consequence of law? For the statute was made for the preservation of the public peace, and that is the reason that no writ of error lies in the Exchequer Chamber, by force of the statute 27 Eliz., in a judgment in the King's Bench on an action *de scandalis*, for it is not included within the words of the statute: for though the statute says, such writ shall lie upon judgments in actions on the case, yet it does not extend to that action, although it be an action on the case, because[1] it is an action of a far higher degree, being founded specially upon a statute; Cro. 142. If then, when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. But there wants not a statute too in this case, for by West. 1, 3 Edw. 1, c. 5, it is enacted, "that for as much as elections ought to be free, the king forbids, upon grievous forfeiture, that any great man, or other, by power of arms or by malice or menaces, shall disturb to make free election," 2 Inst. 168, 169. And this statute, as my Lord Coke observes, is only an enforcement of the common law; and if the parliament thought the freedom of elections to be a matter of that consequence, as to give their sanction to it, and to enact that they should be free, it is a violation of that statute to disturb the plaintiff in this case in giving his vote at an election, and consequently actionable.

And I am of opinion, that this action on the case is a proper action. My brother Powell, indeed, thinks, that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is

[1] See 1 Bl. Com., 28.

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impossible to prove the contrary; for *a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right.* As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though do him no damage: for it is an invasion of his property, and the other has no right to come there; and in these cases the action is brought *vi et armis.* But for invasion of another's franchise trespass *vi et armis* does not lie, but an action of trespass on the case; as where a man has *retorna brevium*, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say that it will occasion multiplicity of actions: for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a public nuisance, every man shall have his action, as is agree in *William's case* [1]; and *Westbury* and *Powell.* [2] *Indeed where many men are offended by one particular act, there they must proceed by way of indictment, and not of action; for in that case the law will not multiply actions.* But it is otherwise when one man only is offended by that act, he shall have his action; as if a man dig pit in a common, every commoner shall have an action on the case *per quod communiam suam in tam amplo modo habere non potuit*; for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway; every passenger shall not bring his action, but the [3] party shall be punished by indictment, because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action. In the case of *Turner* v.

[1] 5 Co., 73 a.
[2] Co. Lit., 56 a.
[3] See 1 Ld. Raym., 486.

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Sterling[1] the plaintiff was not elected; he could not give in evidence the loss of his place as a damage, for he was never in it; but the *gist* of the action is, that, the plaintiff having a right to stand for the place, and it being difficult to determine who had the majority, he had therefore a right to demand a poll, and the defendant, by denying it, was liable to an action. If public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences. So the case of *Hunt* and *Dowman*,[2] where an action on the case is brought by him in reversion against lessee for years for refusing to let him enter into the house to see whether any waste was committed. In that case the action is not founded on the damage, for it did not appear that any waste was done, but because the plaintiff was hindered in the enjoyment of his right, and surely no other reason for the action can be supposed.

But in the principal case, my brother says we cannot judge of this matter, because it is a parliamentary thing. O! by all means, be very tender of that. Besides, it is intricate, that there may be contrariety of opinions. But this matter can never come in question in parliament, for it is agreed that the persons for whom the plaintiff voted were elected, so that the action is brought for being deprived of his vote; and if it were carried for the other candidates against whom he voted, his damage would be less. To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to encroach or enlarge our jurisdiction; by so doing we usurp both on the right of the queen and the people: but sure we may determine on a charter granted by the king, or on a matter of custom or prescription, when it comes before us, without encroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of

[1] 2 Lev., 250.
[2] Cro. Jac., 478.

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it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament, undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.

My brother Powell says, that the plaintiff's right of voting ought first to have been determined in parliament, and to that purpose cites the opinion of my Lord Hobart, 318, that the patron may bring his action upon the case against the ordinary after a judgment for him in a *quare impedit*, but not before. It is indeed a fine opinion, but I do not know whether it will bear debating, or how it will prove when it comes to be handled. For at common law the patron had no remedy for damages against the disturber, but the statute 13 Ed. 1, st. 1, c. 5, s. 3, gives him damages; but if he will not make the bishop a party to the suit, he has lost his remedy which the statute gives him. But in our case the plaintiff has no opportunity to have remedy elsewhere. My brother Powys has cited the opinion of Littleton on the statute of Merton that no action lay upon the words "*si parentes conquerantur*," because none had ever been brought; yet he cannot depend upon it. Indeed, that is an argument, when it is founded upon reason, but it is none when it is against reason. But I will consider the opinion. Some question has arisen on the opening of that statute on those words, "*si parentes conquerantur &c.*," what was the meaning of them, whether they meant a complaint in court in a judicial manner.[1] But it[2] is, plain the word "*conquerantur*" means only "*si parentes lamententur*" that is, only a complaint *in pais*, and not in a court: for the guardian in socage shall enter in that case, and shall have a special writ *de ejectione custodiæ terræ et hæredis*. But this saying has no great force; if it had, it would have

[1] That usage may explain the meaning of an ancient statute. See *Rex* v. *Scot*, 3 T. R., 604; *Sheppard* v. *Gosland*, Vaugh., 169; *Dunbar* v. *Roxburghe*, 3 Cl. & Fin., 335; *The Montrose Peerage case*, 1 Macqueen, H. L., 401. In *Bank of England* v. *Anderson*, 3 B. N. C., 666, Tindal, C. J., said: "We attribute great weight to that maxim of law, *contemporanea expositio fortissima est in lege*." And this was said with reference to a statute no older than 5 & 6 W. & M. (See Broom's Legal Maxims, 6th ed. 638 *et seq.*)

[2] See Litt., 108.

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been destructive of many new actions, which are at this day held to be good law. The case of *Hunt* v. *Bowman*,[1] before mentioned, was the first action of that nature; but it was grounded on the common reason and the ancient justice of the law. So the case of *Turner* v. *Sterling*.[2] Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio, idem jus*. This privilege of voting does not differ from any other franchise whatsoever. If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections; but we must not be frighted, when a matter of property comes before us, by saying it belongs to the parliament; we must exert the Queen's jurisdiction. My opinion is founded on the law of England. The case of *Mors* and *Slue* [3] was the first action of that nature: but the novelty of it was no objection to it. So the case of *Smith* v. *Crashaw*[4] that an action of the case lay for falsely and maliciously indicting the plaintiff for treason; though the objections were strong against it, yet it was adjudged, that if the prosecution were without probable cause, there was as much reason the action should be maintained as in other cases. So 15 Car. 2, C. B., between *Bodily* and *Long*, it was adjudged by Bridgman, Chief Justice, &c, that an action on the case lay for a riding whenever the plaintiff and his wife fought, for it was scandalous and reproachful thing.[5] So in the case of *Herring* and *Finch* [6] nobody scrupled but that the action well lay, for the plaintiff was thereby deprived of his right. And if an action is maintainable against an officer for hindering the plaintiff from voting for a mayor of a corporation, who cannot bind him in his liberty nor estate, to say that yet this action will not lie in our case, for hindering the plaintiff to vote at an

[1] Cro. Jac., 478.

[2] 2 Lev., 250.

[3] 1 Vent., 190, 238.

[4] Cro. Car., 15; W. Jones, 93.

[5] As to "riding Skimmington" or "riding the stang," see also *R.* v. *Roberts*, 3 Keb. 578; *Mason* v. *Jennings*, Sir T. Raym. 401; *Cropp* v. *Tilney*, 3 Salk. 226.

[6] 2 Lev., 250.

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election of his representative in parliament, is inconsistent. Therefore my opinion is, that the plaintiff ought to have judgment.

NOTICE.

This judgment was subsequently affirmed by a majority of the House of Lords.

This case illustrates the maxim *ubi jus ibi remedium*, there is no wrong without a remedy, or as Lord Coke puts it in his Institutes (Co. Litt., 197 b), the law wills that in every case where a man is wronged and endamaged, he shall have remedy. [See Broom's Legal Maxims, 7th Edn. pp. 150, 152, and 157.]

The principle of the leading case has been frequently applied in this country; see *Dawan Singh* v *Mahip Singh*, I. L. R., 10 All., 425 at 446, [judgment of Mahmud J.]; *Raghavendra* v. *Kashinath*, I. L. R., 19 Bom., 717 at 721 (judgment of Jardine J.); *Girish* v. *Jatadhari*, I. L. R., 26 Calc., 653 at 673 (judgment of Ghosh, J.)

MOHORI BIBEE

v.

DHURMODAS GHOSE.*

[*Reported in L. R., 30 I. A., 114 ; I. L. R., 30 Calc. 539.*]

1903
March, 4.

The judgment of their Lordships was delivered by

Sir Ford North.—On July 20, 1895, the respondent, Dhurmodas Ghose, executed a mortgage in favour of Brahmo Dutt, a money-lender carrying on business at Calcutta and elsewhere, to secure the repayment of Rs. 20,000 at 12 per cent. interest on some houses belonging to the respondent. The amount actually advanced is in dispute. At that time the respondent was an infant ; and he did not attain twenty-one until the month of September following. Throughout the transaction Brahmo Dutt was absent from Calcutta, and the whole business was carried through for him by his attorney, Kedar Nath Mitter, the money being found by Dedraj, the local manager of Brahmo Dutt. While considering the proposed advance, Kedar Nath received information that the respondent was still a minor ; and on July 15, 1895, the following letter was written and sent to him by Bhupendra Nath Bose, an attorney :—

"Dear Sir,—I am instructed by S. M. Jogendraaundinee Dasi, the mother and guardian appointed by the High Court under its letters patent of the person and property of Babu Dhurmodas Ghose, that a mortgage of the properties of the said Babu Dhurmodas Ghose is being prepared from your office. I am instructed to give you notice, which I hereby do, that the said Babu Dhurmodas Ghose is still an infant under the age of twenty-one, and any one lending money to him will do so at his own risk and peril."

Kedar Nath positively denied the receipt of any such letter ; but the Court of first instance and the appellate Court both held that he did personally receive it on July 15 ; and the evidence is conclusive upon the point.

* *Present:*—Lord Macnaghten, Lord Davey, Lord Lindley, Sir Ford North, Sir Andrew Scoble, and Sir Arthur Wilson.

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On the day on which the mortgage was executed, Kedar Nath got the infant to sign a long declaration, which he had prepared for him, containing a statement that he came of age on June 17; and that Babu Dedraj and Brahmo Dutt, relying on his assurance that he had attained his majority, had agreed to advance to him Rs. 20,000. There is conflicting evidence as to the time when and circumstances under which that declaration was obtained; but it is unnecessary to go into this, as both Courts below have held that Kedar Nath did not act upon, and was not misled by, that statement, and was fully aware at the time the mortgage was executed of the minority of the respondent. It may be added here that Kedar Nath was the attorney and agent of Brahmo Dutt, and says in his evidence that he got the declaration for the greater security of his "client." The infant had not any separate legal adviser.

On September 10, 1895, the infant, by his mother and guardian as next friend, commenced this action against Brahmo Dutt, stating that he was under age when he executed the mortgage, and praying for a declaration that it was void and inoperative, and should be delivered up to be cancelled.

The defendant, Brahmo Dutt, put in a defence that the plaintiff was of full age when he executed the mortgage; that neither he nor Kedar Nath had any notice that the plaintiff was then an infant; that, even if he was a minor, the declaration as to his age was fraudulently made to deceive the defendant, and disentitled the plaintiff to any relief; and that in any case the Court should not grant the plaintiff any relief without making him repay the moneys advanced.

By a further statement the defendant alleged that the plaintiff had subsequently ratified the mortgage; but this case wholly failed, and is not the subject of appeal.

Jenkins, J., who presided in the Court of first instance, found the facts as above stated, and granted the relief asked. And the appellate Court dismissed the appeal from him. Subsequently to the institution of the present appeal Brahmo Dutt died, and this appeal has been prosecuted by the executors.

The first of the appellants' reasons in support of the present appeal is that the Courts below were wrong in holding that the knowledge of Kedar Nath must be imputed to the defendant.

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In their Lordships' opinion they were obviously right. The defendant was absent from Calcutta, and personally did not take any part in the transaction. It was entirely in charge of Kedar Nath, whose full authority to act as he did is not disputed. He stood in the place of the defendant for the purposes of this mortgage; and his acts and knowledge were the acts and knowledge of his principal. It was contended that Dedraj, the defendant's *gomastha*, was the real representative in Calcutta of the defendant and that he had no knowledge of the plaintiff's minority. But there is nothing in this. He no doubt made the advance out of the defendant's funds. But he says in his evidence that "Kedar Babu was acting on behalf of my master from the beginning in this matter"; and a little further on he adds that before the registration of the mortgage he did not communicate with his master on the subject of the minority. But he did know that there was a question raised as to the plaintiff's age; and he says, "I left all matters regarding the minority in the hands of Kedar Babu."

The appellants' Counsel contended that the plaintiff is estopped by s. 115 of the Indian Evidence Act (I of 1872) from setting up that he was an infant when he executed the mortgage. The section is as follows: "Estoppel. When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

The Courts below seem to have decided that this section does not apply to infants; but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties, and their Lordships hold, in accordance with English authorities, that a false representation, made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy; *Nelson* v. *Stocker*.[1] The same

[1] 4 De G. & J., 458.

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principle is recognised in the explanation to s. 19 of the Indian Contract Act, in which it is said that a fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

The point most pressed, however, on behalf of the appellants was that the Courts ought not to have decreed in the respondent's favour without ordering him to repay to the appellants the sum of Rs. 10,500, said to have been paid to him as part of the consideration for the mortgage. And in support of this contention s. 64 of the Contract Act (IX of 1872) was relied on :—

"Sect. 64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

Both Courts below held that they were bound by authority to treat the contracts of infants as voidable only, and not void ; but that this section only refers to contracts made by persons competent to contract, and therefore not to infants.

The general current of decision in India certainly is that ever since the passing of the Indian Contract Act (IX of 1872), the contracts of infants are voidable only. This conclusion, however, has not been arrived at without vigorous protests by various Judges from time to time ; nor indeed without decisions to the contrary effect. Under these circumstances, their Lordships consider themselves at liberty to act on their own view of the law as declared by the Contract Act, and they have thought it right to have the case re-argued before them upon this point. They do not consider it necessary to examine in detail the numerous decisions above referred to, as in their opinion the whole question turns upon what is the true construction of the Contract Act itself. It is necessary, therefore, to consider carefully the terms of that Act ; but before doing so it may be convenient to refer to the Transfer of Property Act (IV of 1882), s. 7 of which provides that every person competent to contract and entitled to transferable

peoperty.....is competent to transfer such property..... in the circumstances, to the extent, and in the manner allowed and prescribed by any law for the time being in force. That is the Act under which the present mortgage was made, and it is merely dealing with persons competent to contract ; and s. 4 of that Act provides that the chapters and sections of that Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. The present case, therefore, falls within the provisions of the latter Act.

Then, to turn to the Contract Act, s. 2 provides : (*e*) Every promise and every set of promises, forming the consideration for each other, is an agreement. (*g*) An agreement not enforceable by law is said to be void. (*h*) An agreement enforceable by law is a contract. (*i*) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.

Sect. 10 provides : "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

Then s. 11 is most important, as defining who are meant by "persons competent to contract" ; it is as follows : "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." Looking at these sections, their Lordships are satisfied that the Act makes it essential that all contracting parties should be "competent to contract," and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. This is clearly borne out by later sections in the Act. Sect. 68 provides that, "If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person." It is beyond question that an infant falls within the class of persons here referred to as incapable of entering into a contract ; and it is clear from the Act that he is not to be liable even for necessaries, and that no demand in

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respect thereof is enforceable against him by law though a statutory claim is created against his property. Under ss. 183 and 184 no person under the age of majority can employ or be an agent. Again, under ss. 247 and 248, although a person under majority may be admitted to the benefits of a partnership, he cannot be made personally liable for any of its obligations; although he may on attaining majority accept those obligations if he thinks fit to do so. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are, therefore, of opinion that in the present case there is not any such voidable contract as is dealt with in s. 64.

A new point was raised here by the appellants' Counsel, founded on s. 65 of the Contract Act, a section not referred to in the Courts below, or in the cases of the appellants or respondent. It is sufficient to say that this section, like s. 64, starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never could have been, any contract.

It was further argued that the preamble of the Act showed that the Act was only intended to define and amend certain parts of the law relating to contracts, and that contracts by infants were left outside the Act. If this were so, it does not appear how it would help the appellants. But in their Lordships' opinion the Act, so far as it goes, is exhaustive and imperative, and does provide in clear language that an infant is not a person competent to bind himself by a contract of this description.

Another enactment relied upon as a reason why the mortgage money should be returned is s. 41 of the Specific Relief Act (I of 1877), which is as follows: Sect. 41. "On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require." Sect. 38 provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court; but the Court of first instance, and subsequently the appellate Court in the exercise of such discretion came to the conclusion that under the circumstances of this case justice did not require them

to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised.

It was also contended that one who seeks equity must do equity. But this is the last point over again, and does not require further notice except by referring to a recent decision of the Court of Appeal in *Thurston* v. *Nottingham Permanent Benefit Building Society*,[1] since affirmed by the House of Lords.[2] In that case a female infant obtained from the society of which she was a member part of the purchase money of some property she purchased; and the society also agreed to make her advances to complete certain buildings thereon. They made the advances, and took from her a mortgage for the amount. On attaining twenty-one she brought the action to have the mortgage declared void under the Infants Relief Act. The Court held that, as regards the purchase money paid to the vendor, the society was entitled to stand in his place and had a lien upon the property, but that the mortgage must be declared void, and that the society was not entitled to any repayment of the advances. Dealing with this part of their claim, Romer, L. J., says:[3] "The short answer is that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." So here.

Their Lordships observe that the construction which they have put upon the Contract Act seems to be in accordance with the Old Hindu Law as declared in the laws of Manu Ch. viii., 163; and Colebrooke's Dig. liii. 2, Vol. ii, p. 181; although there are no doubt decisions of some weight that before the Indian Contract Act an infant's contract was voidable only in accordance with English law as it then stood.

The appeal, therefore, wholly fails; and their Lordships will humbly advise His Majesty that it should be dismissed. The appellants must pay the costs of the appeal.

[1] (1902) 1 Ch., 1.
[2] (1903) A. C., 6.
[3] 1 Ch. at p. 13.

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The Bombay High Court pointed out in *Dattaram* v. *Vinayak*, I. L. R., 28 Bom. 181, that while this leading case decides that a contract by a minor such as a mortgage is void, and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money upon declaration of the invalidity of the mortgage, it virtually also decides that the circumstance of a particular case may be such that upon the principle embodied in Sec. 41 of the Specific Relief Act, the Court may upon cancellation of the instrument require the party to whom such relief is granted to make any compensation to the other which justice may require. This equitable principle is of much wider application and may be availed of whether the instrument is pronounced to be invalid at the instance of the plaintiff or the defendant. See *Eastern Mortgage and Agency Co.* v. *Rebati Kumar Roy*, 3 C. L. J., 260.

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[*Reported in L. R., 6 Q. B., 597.*]

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June, 6.

The following judgments were delivered:—

COCKBURN, C. J.—This was an action brought in the county Court of Surrey, upon a contract for the sale of a quantity of oats by plaintiff to defendant, which contract the defendant had refused to complete, on the ground that the contract had been for the sale and purchase of *old* oats, whereas the oats tendered by the plaintiff had been oats of the last crop, and therefore not in accordance with the contract.

The plaintiff was a farmer, the defendant a trainer of race horses. And it appeared that the plaintiff, having some good winter oats to sell, had applied to the defendant's manager to know if he wanted to buy oats, and having received for answer that he (the manager) was always ready to buy good oats, exhibited to him a sample, saying at the same time that he had forty or fifty quarters of the same oats for sale, at the price of 35*s.* per quarter. The manager took the sample, and on the following day wrote to say he would take the whole quantity at the price of 34*s.* a quarter.

Thus far the parties were agreed; but there was a conflict of evidence between them as to whether anything passed at the interview between the plaintiff and defendant's manager on the subject of the oats being *old* oats; the defendant asserting that he had expressly said that he was ready to buy old oats, and that the plaintiff had replied that the oats, were old oats, while the plaintiff denied that any reference had been made to the oats being old or new.

The plaintiff having sent in a portion of the oats, the defendant, on meeting him afterwards, said, "Why, those were new oats you sent me"; to which the plaintiff having answered, "I knew they were; I had none other," the defendant replied, "I thought I was buying old oats: new oats are useless to me; you must take them back." This the plaintiff refused to do, and brought this action.

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It was stated by the defendant's manager that trainers as a rule always use old oats, and that his own practice was never to buy new oats if he could get old.

But the plaintiff denied having known that the defendant never bought new oats, or that trainers did not use them; and, on the contrary, asserted that a trainer had recently offered him a price for new oats. Evidence was given for the defendant that 34*s*. a quarter was a very high price for new oats, and such as a prudent man of business would not have given. On the other hand, it appeared that oats were at the time very scarce and dear.

The learned Judge of the county Court left two questions to the jury, *first*, whether the word "old" had been used with reference to the oats in the conversation between the plaintiff and the defendant's manager; *secondly*, whether the plaintiff had believed that the defendant believed, or was under the impression, that he was contracting for old oats; in either of which cases he directed the jury to find for the defendant.

It is to be regretted that the jury were not required to give specific answers to the questions so left to them. For, it is quite possible that their verdict may have been given for the defendant on the first ground; in which case there could, I think, be no doubt as to the propriety of the Judge's direction; whereas now, as it is possible that the verdict of the jury—or at all events of some of them—may have proceeded on the second ground, we are called upon to consider and decide whether the ruling of the learned Judge with reference to the second question was right.

For this purpose we must assume that nothing was said on the subject of the defendant's manager desiring to buy *old* oats, nor of the oats having been said to be old; while, on the other hand, we must assume that the defendant's manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not.

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The oats offered to the defendant's manager were a specific parcel, of which the sample submitted to him formed a part. He kept the sample for twenty-four hours, and had, therefore, full opportunity of inspecting it and forming his judgment upon it. Acting on his own judgment, he wrote to the plaintiff, offering him a price. Having this opportunity of inspecting and judging of the sample, he is practically in the same position as if he had inspected the oats in bulk. It cannot be said that, if he had gone and personally inspected the oats in bulk, and then, believing—but without anything being said or done by the seller to bring about such a belief—that the oats were old, had offered a price for them, he would have been justified in repudiating the contract, because the seller, from the known habits of the buyer, or other circumstances, had reason to infer that the buyer was ascribing to the oats a quality they did not possess, and did not undeceive him.

I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty—as where, for instance, an article is ordered for a specific purpose—and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule *caveat emptor* applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding.

Mr. Justice Story, in his work on Contracts (Vol. I, s. 516), states the law as to concealment as follows:—"The general rule,

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both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed." "Thus," he goes on to say (s. 517), "although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of *caveat emptor*, he is not, ordinarily, bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee." "But," he continues (s. 518), "an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract." Further, distinguishing between extrinsic circumstances affecting the value of the subject-matter of a sale, and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, he points out (s. 519), that with reference to the latter, the rule is "that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case." In the doctrine thus laid down I entirely agree.

Now, in this case, there was plainly no legal obligation in the plaintiff in the first instance to state whether the oats were new or old. He offered them for sale according to the sample, as he had a perfect right to do, and gave the buyer the fullest opportunity of inspecting the sample, which, practically, was equivalent to an inspection of the oats themselves. What, then, was there to create any trust or confidence between the parties, so as to make it incumbent on the plaintiff to communicate the fact that the oats were not, as the defendant assumed them to be, old oats? If, indeed, the buyer, instead of acting on his own opinion, had asked the question whether the oats were old or new or had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different; or even if he had said anything which shewed

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that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller, as a means of misleading him, might have amounted to a fraudulent concealment, such as would have entitled the buyer to avoid the contract. Here, however, nothing of the sort occurs. The buyer in no way refers to the seller, but acts entirely on his own judgment.

The case of *Horsfall* v. *Thomas*,[1] if that case can be considered good law, is an authority in point. In that case a gun which had been manufactured for a purchaser, had, when delivered, a defect in it, which afterwards caused it to burst; yet it was held that, although the manufacturer, instead of making the purchaser acquainted with the defect, had resorted to a contrivance to conceal it, as the buyer had had an opportunity of inspecting the gun, and had accepted it without doing so, and had used it, it was not competent to him to avoid the contract on the ground of fraud. The case has, however, been questioned; and dissenting altogether from the decision, I notice it only to say that my opinion in the present case has been in no degree influenced by authority.

In the case before us it must be taken that, as the defendant, on a portion of the oats being delivered, was able by inspection to ascertain that they were new oats, his manager might, by due inspection of the sample, have arrived at the same result. The case is, therefore, one of the sale and purchase of a specific article after inspection by the buyer. Under these circumstances the rule *caveat emptor* clearly applies; more especially as this cannot be put as a case of latent defect, but simply as one in which the seller did not make known to the buyer a circumstance affecting the quality of the thing sold. The oats in question were in no sense defective, on the contrary they were good oats, and all that can be said is that they had not acquired the quality which greater age would have given them. There is not, so far as I am aware, any authority for the position that a vendor who submits the subject-matter of sale to the inspection of the vendee, is bound to state circumstances which may tend to detract from the estimate which the buyer may injudiciously

[1] 1 H. & C., 90; 31 L. J. (Ex.), 322.

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have formed of its value. Even the civil law, and the foreign law founded upon it, which require that the seller shall answer for latent defects, have never gone the length of saying that, so long as the thing sold answers to the description under which it is sold, the seller is bound to disabuse the buyer as to any exaggerated estimate of its value.

It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiff to sell new, so the two minds were not *ad idem*; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel.

The result is that, in my opinion, the learned Judge of the county Court was wrong in leaving the second question to the jury, and that, consequently, the case must go down to a new trial.

Blackburn, J.—In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some

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fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a Court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor. And I also agree that where a specific lot of goods are sold by a sample, which the purchaser inspects instead of the bulk, the law is exactly the same, if the sample truly represents the bulk; though, as it is more probable that the purchaser in such a case would ask for some further warranty, slighter evidence would suffice to prove that, in fact, it was intended there should be such a warranty. On this part of the case I have nothing to add to what the Lord Chief Justice has stated.

But I have more difficulty about the second point raised in the case. I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman* v. *Cooke*.[1] If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

The jury were directed that if they believed the word "old" was used, they should find for the defendant—and this was right; for if that was the case, it is obvious that neither did the defendant intend to enter into a contract on the plaintiff's terms, that is, to buy this parcel of oats without any stipulation as to their quality; nor could the plaintiff have been led to believe he was intending to do so.

But the second direction raises the difficulty. I think that, if from that direction the jury would understand that they were first to consider whether they were satisfied that the defendant intended to buy this parcel of oats on the terms that it was part of his contract with the plaintiff that they were old oats, so as to have

[1] 2 Ex at p. 663; 18 L. J. (Ex) at p. 119.

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the warranty of the plaintiff to the effect, they were properly told that, if that was so the defendant could not be bound to a contract without any such warranty unless the plaintiff was misled. But I doubt whether the direction would bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old.

The difference is the same as that between buying a horse believed to be sound, and buying one believed to be warranted sound; but I doubt if it was made obvious to the jury, and I doubt this the more because I do not see much evidence to justify a finding for the defendant on this latter ground if the word "old" was not used. There may have been more evidence than is stated in the case; and the demeanour of the witnesses may have strengthened the impression produced by the evidence there was; but it does not seem a very satisfactory verdict if it proceeded on this latter ground. I agree, therefore, in the result that there should be a new trial.

HANNEN, J.—I think there should be a new trial in this case, not because the ruling of the county Court Judge was incorrect, but because, having regard to the evidence, I think it doubtful whether the jury sufficiently understood the direction they received to enable them to take it as their guide in determining the question submitted to them.

It appears from the evidence on both sides that the plaintiff sold the oats in question by a sample which the defendant's agent took away for examination. The bargain was only completed after this sample had been in the defendant's possession for two days. This, without more, would lead to the conclusion that the defendant bought on his own judgment as to the quality of the oats represented by the sample and with the usual warranty only, that the bulk should correspond with it. There might, however, be superadded to this warranty an express condition that the oats should be old, and the defendant endeavoured by his evidence to establish that there was such an express bargain between him and the plaintiff. This was the first question which the jury had to consider; but as they have not stated whether they answered it in favour of the defendant, it is possible—and, from the Judge's report, it is most probable—that they did not so answer

it, and the case must be considered on the assumption that there was no express stipulation that the oats were old.

There might have been an implied term in the contract arising from previous dealings or other circumstances, that the oats should be old ; but the learned Judge probably thought the evidence did not make it necessary that he should leave this question to the jury. And the second question, which he did leave to them, seems intended to ascertain whether there was any contract at all between the parties.

It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them *Raffles* v. *Wichelhaus*.[1]

But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the the vendor, by mistake exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor : *Scott* v. *Littledale*.[2]

But if in the last mentioned case, the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to shew that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock cited from Paley,[3] that a promise is to be performed "in that sense in which promisor apprehended at the time the promisee received it," and may be thus expressed : "The promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it." And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what

[1] 2 H. & C., 906 ; 33 L.J. (Ex.) 160.
[2] 8 D. & B. 815 ; 27 L. J. (Q. B.) 201.
[3] Moral and Political Philosophy. Bk. iii, Ch. 5.

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way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the the mind of the promisor did not assent.

If, therefore, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain.

This was the question which the learned Judges intended to leave to the jury; and, as I have already said, I do not think it was incorrect in its terms, but I think that it was likely to be misunderstood by the jury. The jury were asked, "whether they were of opinion, on the whole of the evidence, that the plaintiff believed the defendant to believe, or to be under the impression that he was contracting for the purchase of old oats? If so, there would be a verdict for the defendant." The jury may have understood this to mean that, if the plaintiff believed the defendant to believe that he was buying old oats, the defendant would be entitled to the verdict; but a belief on the part of the plaintiff that the defendant was making a contract to buy the oats, of which he offered him a sample, under a mistaken belief that they were old, would not relieve the defendant from liability unless his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment by him of a fact which it became his duty to communicate. In order to relieve the defendant it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats.

I am the more disposed to think that the jury did not understand the question in this last sense because I can find very little, if any, evidence to support a finding upon it in favour of

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the defendant. It may be assumed that the defendant believed the oats were old, and it may be suspected that the plaintiff thought he so believed, but the only evidence from which it can be inferred that the plaintiff believed that the defendant thought that the plaintiff was making it a term of the contract that the oats were old, is that the defendant was a trainer, and that trainers, as a rule, use old oats; and that the price given was high for new oats, and more than a prudent man would have given.

Having regard to the admitted fact that the defendant bought the oats after two days' detention of the sample, I think that the evidence was not sufficient to justify the jury in answering the question put to them in the defendant's favour, if they rightly understood it; and I therefore think there should be a new trial.

Judgment accordingly.

NOTE.

This case relates to the effects of passive acquiescence by the seller in the self-deception of the buyer. The general rule laid down in *Freeman* v. *Cooke*, 1 Exch. 663 may be stated as follows: If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound, as if he had intended to agree to the other parties' terms. But although this is so, the law will not allow a man to make or accept a promise which he knows that the other party understands in a different sense from that in which he understands it himself.

Questions of some nicety however arise upon the application of those principles, as will be obvious if the leading case is contrasted against the decision in *Denney* v. *Hancock*, L. R. 6 Ch. App. 1. See also the subject discussed in Pollock on Contracts, 7th Edition, p. 485.

As an instance of the application of the principles to this country, see *Dagdu* v. *Bhana*, I. L. R. 28 Bom. 420.

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BAXENDALE.

[*Reported in 9 Exch. 341; 96 R. R. 742.*]

The judgment of the Court was delivered by

1854
February, 23.

ALDERSON, B.—We think that there ought to be a new trial in this case: but in so doing we deem it to be expedient and necessary to state explicity the rule which the Judge, at the next trial, ought, in our opiuion, to direct the jury to be governed by when they estimate the damages. It is, indeed, of the last importance that we should do this; for if the jury are left without any definite rule to guide them, it will in such cases as these manifestly lead to the greatest injustice. The courts have done this on several occasions; and in *Blake* v. *The Midland Railway Company* [1] the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at *Nisi Prius*.

"There are certain established rules," this Court says in *Alder* v. *Keighly*,[2] "according to which the jury ought to find." And the Court in that case adds: "and here there is a clear rule that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the

[1] 18 Q. B. 93; 88 R. R. 543.
[2] 15 M. and W., 117; 71 R. R. 592.

plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as in such cases both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated, as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule.

Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances reasonably shew that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in his possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery

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would have no effect upon the intermediate profits of the mill. Or, again, suppose that at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also the same results will follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of the profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending of broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not in all probability have occurred; and these special circumstances were never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There, must, therefore, be a new trial in this case.

Rule absolute.

NOTE.

The principle deducible from the leading case may be stated as follows:—When two parties make a contract and one of them breaks it, he is liable to pay to the other such damages as may be considered either

(*a*) to arise naturally, that is, according to the usual course of things from such breach of contract itself, or

(*b*) to have been in the contemplation of the parties, at the time they made the contract, as the probable result of its breach.

See section 73 of the Indian Contract Act, where a similar rule is laid down.

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There has been some divergence of judicial opinion as to the grounds of the rule and the effect of its application in particular cases. It seems obvious that a man may be deemed to foresee those consequences of his conduct which a reasonable man in his place and with his knowledge and means of information would foresee as probable, and for such consequences he may be justly held answerable, if he is bound to use any caution or diligence at all. But cases have gone further and there are *dicta* to the effect that if a man is to answer for consequences which can be foreseen only with special knowledge of circumstances not manifest on the face of the business, it must be because, he not only is aware of them at the time of contracting, but specially accepts responsibility for them, or "accepts the contract with the special conditions attached to it," so that "an actual contract arises to bear the exceptional loss." [*Horne* v. *Midland Railway Co.*, L. R. 7 C. P. 583, 8 C. P. 131.]

Recent decisions however affirm the principle of liability laid down in the leading case and do not support the doctrine of an auxiliary special contract. [*Ayius* v. *G. W. Railway Co.*, (1899) 1 Q. B. 413.] See also *Hammond* v. *Bussey*, 20 Q. B. D. 79, and *Ebbetts* v. *Conquest* (1896) A. C. 490. Reference may also be made to a paper by F. E. Smith in 16 Law Quarterly Review 275.

A special loss which would not naturally and obviously flow from the breach must, if it is to be recovered, be matter of express terms in the making of the contract; see the decision of the Supreme Court of the United States in *Globe Refining Co.*, v. *Oil Co.*, 190 U. S. 540.

RAM COOMAR COONDOO

v.

CHUNDER CANTO MOOKERJEE.[1]

[Reported in L. R., 4 I. A., 23 ; 2 App. Cas. 186 ; I. L. R., 2 Calc. 233.]

The judgment of their Lordships was delivered by

1876
November, 25.

Sir Montague E. Smith.—The suit was instituted by the appellants, who were the successful defendants in two former suits brought by one McQueen and his wife against them, to recover from the defendant, Chunder Canto Mookerjee, who was neither an original nor added party in those suits, the amount of the costs incurred by them in that litigation, and which McQueen and his wife, by reason of their poverty, were unable to pay.

The principal suit of the McQueens (the other being for mesne profits only) was brought in the Hughli Court to recover from the present plaintiffs some lands in Howrah, which their father had purchased of one Bebee Bunnoo.

Mrs. McQueen was the illegitimate daughter of one McDonald and Bebee Bunnoo, and she claimed the property as her father's, and as being entitled to it, after her mother's death, under his will. The defence of the now plaintiffs in that suit was that Bebee Bunnoo was either the real owner, or had been allowed by McDonald to deal with the property as owner, and that their father was a purchaser from her without notice of any other title. It appears that they and their father had held possession of the property for twenty four years after the purchase, and had greatly improved it.

The principal *Sudder Ameen* held the suit to be barred by limitation, and dismissed it. The High Court (finding that Bebee Bunnoo had died within twelve years of the suit) reversed his judgment, and having retained the case, and tried it on the merits, passed a decree in favour of the then plaintiffs, the McQueens.

[1] *Present :*—Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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On an appeal to Her Majesty, the decree of the High Court was reversed, and it was ordered that the suits should be dismissed, and that the then defendants (the now plaintiffs) should have their costs in India, and of their appeal to Her Majesty.

These costs amounted to a large sum, and the McQueens were unable to pay them.

The connection of the defendant Mookerjee with the above litigation, and the facts relied on to support the present action, will now be referred to.

A special agreement was entered into between the McQueens and Mookerjee, which recited an apparently good title of the former to the property. By this agreement Mookerjee was appointed the attorney and *mookhtear* on the McQueens to conduct the litigation against the present plaintiffs. On the one side he undertook to manage the suit, to make all necessary advances for the purpose, and further to make an allowance of Rs. 150 *per mensem* to the McQueens, for their support during the pendency of the proceedings. On the other side they agreed in effect that Mookerjee should have the management of the suit, they, however, assisting him, unless it happened that McQueen could give his whole attention to the litigation, in which case he was to have the conduct of it, "but under the control of Mookerjee."

It was stipulated that all the advances should be repaid with interest at 12 per cent., and that, as remuneration for his trouble and risk, Mookerjee should have a third part of "the clear net profits" of the suit; and by way of security, it was agreed that he should receive all moneys, and take possession of all lands recovered, and after satisfying his own claims pay over the balance to the McQueens.

This power of attorney was made irrevocable, unless upon the terms that the McQueens should repay all the moneys advanced with interest at 12 per cent., and a further sum of Rs. 2,000 as liquidated damages.

McQueen certainly did not give his whole attention to the suits; and (although he occasionally saw the pleaders) they were really managed by Mookerjee.

It appears that after the present plaintiffs had obtained leave to appeal from the judgment of the High Court in the original

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suit, the McQueens obtained possession of the property. The Court having ordered the possession to be restored, unless the McQueens gave security to the amount of Rs. 12,000 to repay what would be due in case the decree should be reversed, the present defendant gave a bond to the above amount as such security.

Pending the appeal to Her Majesty, Mookerjee purchased of the McQueens all their interest in the principal suit, and the suit for mesne profits, for Rs. 22,000 out of which he was to deduct Rs. 12,500 for the advances he had made to them, and from this time he appears to have conducted the appeal in his own interest.

It should be stated that, in the former suit, the now plaintiffs—upon the agreement between Mookerjee and the McQueens coming to their knowledge—applied to the Judge to have Mookerjee made a party to the suit under the 73rd clause of Act VIII of 1859, in order that, if successful, they might make him responsible for costs. The Judge refused the application. Upon the appeal to the High Court by the McQueens, the present plaintiffs raised this point in their memorandum of cross-appeal, but no notice appears to have been taken of it the judgment of that Court.

The plaint in the present action alleges that the plaintiffs being in lawful possession as owners of the property in question, the defendant, knowing this was so, maliciously conspired with the McQueens to bring a suit in their names to take the possession from them, and in furtherance of this conspiracy entered into the agreement already described, which is set out at length. It then alleges that the agreement contains false and fraudulent recitals of a pretended title in the McQueens and that it "savours of champerty and maintenance, and is otherwise wholly illegal and contrary to public policy," and was entered into "for the purpose of barratrously maintaining an unjust and oppressive suit against the plaintiffs," in the names of persons who had no right, and were without means to pay the cost. It then avers that the former suit was brought "maliciously and without reasonable and probable cause," and after describing the proceedings in the suit, and the facts showing the defendant's connection with them, alleges that "the litigation

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was instigated and carried on by the defendant at his own expense, and with a view to his own benefit, and that he was the real mover, and unlawfully used the procedure of the Court for his own benefit."

If all these allegations in the plaint, or so many of them as aver that the suit was brought or instigated by the defendant, maliciously, and without probable cause, had been proved, this action would, undoubtedly, have been sustained upon the principle that the prosecution of legal proceedings which are instigated by malice, and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them.

This principle is thus stated by Mr. Justice Williams in *Cotterell* v. *Jones* [1]:—

"It is clear no action will lie for improperly putting the law in motion in the name of a third person, unless it is alleged and proved that it is done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

In the present case, however, both the Courts below have found that neither malice nor the absence of probable cause have been proved. Their Lordships entirely agree with the Courts in India on this point, and it appears to them that the facts present a case having a wholly different aspect.

With regard to the motives of the defendant it is not pretended that he entertained any ill-felling or malice in any sense towards the plaintiffs. The terms of the agreement, and his large expenditure, show that he was prompted in what he did by his having formed a favourable and sanguine opinion of the title of the McQueens, and by the hope of a profitable return for his advances. Nor can the suit be said to have been wanting in probable cause, when the two learned Judges of the High Court who heard it on appeal decided in favour of the then plaintiffs. Indeed, it was properly admitted at their Lordships' bar that the case must be considered as if the allegations of malice and want of probable cause were struck out of the plaint.

[1] 11 C. B., 713.

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These allegations being eliminated, the question is whether the action can be maintained upon either of the two grounds argued at the bar, which, stating them generally, are :—

1. That the agreement and acts of the defendant amounted to champerty, or were otherwise illegal as being against public policy, and that the plaintiffs have suffered special damage from them.

2. That the defendant was the real actor in the former suits and had an interest in them, and was, therefore, responsible for the costs of them.

The question whether the law of maintenance and champerty, or any rules analogous to that law, as it exists in England, have been introduced into and form part of the law of India, has been for a long period in controversy in the Indian Courts. A beadroll of decisions from 1825 to the present time was cited at the bar, and it certainly appears from them that the views of the Courts have not been uniform, and that great diversity of opinion has prevailed.

The earliest case referred to occurred in the year 1825. A pauper plaintiff in his petition of appeal to the Sudder Court, disclosed the fact that he had agreed to give half the estate in litigation to a third person in consideration of advances made to prosecute the appeal. The Court, after directing a search in the records for precedents of such a transaction, and none having been found, declared that "the transaction savoured strongly of gambling," and also that the contract to give half of a large estate for a comparatively small advance was "by no means fair," and ordered that unless the agreement was cancelled the appeal should not be entertained. *Ram Gholam Sing* v. *Keerut Sing*.[1]

In 1836 the Sudder Court refused to enforce against a successful litigant an agreement he had made to give two annas of the estate if recovered in consideration of advances made to carry on the suit. They held first, that the estate being family property could not be thus disposed of; but they also held on the authority of the decision in 1825 that the transaction was of an illegal character as a species of gambling, and could not be sanctioned in a Court of Justice. *Brijnerain Sing* v. *Tekhnerain Singh*.[2]

[1] 4 Select Reports, 12.

[2] 6 Select Reports, 181.

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In 1840 a similar agreement to that in the last case came before the Court: one Judge thought it was not proved; but the other, Mr. Tucker, held, following the two former decisions, that "the agreement was illegal, thus (as he said) establishing the point for future guidance in all similar cases."—*Zuhooroonnissa Khanum* v. *Raseeck Lal Mitter*.[1]

In a short note of a similar case in 1849, the Court is reported to have said: "As the precedents of the Court have held that champerty is illegal, we cannot enforce any condition (of the kind) in favour of the plaintiffs."—*Andrews* v. *Maharaja Sreesh Chunder Race*.[2]

In the next case the current of opinion underwent a marked change.

In 1852 a case was brought before a full Sudder Court consisting of five Judges, in which the Principal Sudder *Ameen* had dismissed a suit because the plaintiff had obtained the funds to prosecute it by means of an agreement which he deemed to be champertous. This decision of the Principal Sudder *Ameen* was, in any view of the law, erroneous; but the Judges took occasion to express their opinion on the general question. Sir R. Barlow says: "There is no distinct law in our Code which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the plaintiffs." Mr. Welby Jackson, whilst he thought the precedents of the Court (referring to the cases already mentioned), had held champerty to be illegal, says: "But the matter having been now brought up generally for consideration before the whole Court, I have no hesitation in declaring my opinion that an arrangement of the nature of champerty is not of itself illegal or void." Again he says: "I know of no law against such an arrangement, and there is certainly no reason why it should be declared illegal. Such arrangements must stand or fall according to the peculiar nature of their conditions. They are liable to question like any others where a suit is brought to enforce or avoid them." The other three Judges construe the former precedents (with one exception) as holding

[1] 6 Select Reports, 298.

[2] S. D. A., 1849, Beng. 340.

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only "that, as between a plaintiff and a party advancing funds to him to carry on his case, the Courts will not recognize and enforce agreements which appear to be exorbitant and to partake of the nature of gambling contracts."—*Kishen Lal Bhoomick* v. *Pearee Soondree*.[1]

This case appears to have been generally regarded as a leading decision. Mr. Justice Glover so treats it in a case which came before the High Court so late as 1868, and refers to it as deciding that champerty *per se* was not illegal.—*Panch Cowree Mahtoon* v. *Kalee Churn*.[2] In this same case, however, Mr. Justice Macpherson said he did not feel it necessary to decide the question; and in consequence of the opinions expressed by him and other learned Judges in India in recent cases it will be necessary to advert shortly to some of the subsequent decisions.

In *Grose and Another* v. *Amirtamayi Dasi*,[3] which was the case of a contract of a champertous character made by a Hindu widow, Mr. Justice Phear, after a full review of the English and Indian cases, expressed an opinion that the law which renders champerty and maintenance illegal in England is in force at least within the Presidency towns; and further that agreements of that character were against the interests of society in India, and, therefore, on grounds of public policy void. Upon an appeal to the full Court, the Chief Justice (Sir Barnes Peacock) did not adopt this ground of decision. He expressed his opinion thus:—"That the deed was not binding on the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative, if not gambling contract." Mr. Justice Macpherson agreed with Mr. Justice Phear in thinking that the agreement was void, as being against public policy.

Mr. Justice Holloway in a case which came before the High Court of Madras in its original jurisdiction, in 1870, expressed a strong opinion that the English Statute and Common Law relating to champerty and maintenance prevailed in that Court, and rendered contracts bearing that character void. He also, with some vehemence of language, denounced such contracts as being contrary to public policy. The opinion expressed by

[1] S. D. A., 1852, Beng., 394.
[2] 9 Suth. W. R., 490.
[3] 4. B. L. R., O. C., 1.

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Mr. Justice Holloway on the application of the English Statute and Common Law was not necessary to the decision of the case, for the agreement sued upon was clearly extortionate, and there were other sufficient grounds for the refusal of the Court to enforce it.—*Mulla Jaffarji Tyeb A i Saib* v. *Yacuti Kadar Bai.*[1]

This opinion of Mr. Justice Holloway seems to be directly opposed to the view expressed by Chief Justice Scotland in delivering the opinion of the High Court of Madras in a former case *Pitchakutti Chetti* v. *Kamala Naya Khan.*[2] The Chief Justice there says :—" Maintenance and champerty are made offences by the common and statute law of England, which in this respect has no application to the country, and in considering and deciding upon the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the Administration of justice upon which the law at present rests. To this extent we think the law can properly be applied in perfect consistency with the Hindu law relating to contract. (See 1 Strange's Hindu Law, p. 275)."

The passage in Strange alluded to by the Chief Justice descants upon the similarity between English and Hindu law with regard to the invalidity of contracts which violate public policy and the interests of the community.

In a late case in the High Court of Bombay, *Damodhar Madhavji* v. *Kahandas Narandas,*[3] Westropp, C. J., declined to express any opinion as to the extent to which the law of champerty is appliable to the Presidency towns or in the Mofussil.

To return to the Bengal Presidency, it will be necessary to refer to one more decision only before coming to the judgments in the present suit. In the case of *Tara Soondaree Chowdhrani* v. *The Court of Wards,*[4] the Court (Sir R. Couch being Chief Justice) held that the agreement it was sought to enforce was void, "as being contrary to public policy, and as therefore not giving any right to sue for the property which was professed

[1] 7 Mad. H. C. R., 128.
[2] 1 Mad. H. C. R., 153.
[3] 8 Bom. H. C. R. O. C. J., 1.
[4] 20 W. R. 446

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to be passed by it." The learned Chief Justice commented upon and adopted the observations of this tribunal in the case of *Fisher v. Kamala Nicker.*[1] He also referred with approval to the remarks of Mr. Justice Holloway as to the mischievous effects of such agreements in India.

It is to be observed that in none of the above cases did any question arise as to the liability of the parties who entered into the agreements to third persons.

To come to the judgments in the present suit, Mr. Justice Macpherson was of opinion upon the point now under consideration that the agreement was illegal and void as being against public policy, and he held, on the authority of the English case of *Pechell* v. *Watson*,[2] that the present suit might be maintained.

In the judgment of the High Court delivered by Sir R. Couch, C. J., reversing Mr. Justice Macpherson's decree, the Chief Justice says:—"It has been always admitted that the English Common Law and the Statutes as to maintenance and champerty, are not applicable, and are considered as having no force in this country. They certainly do not apply to the mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is that they are contrary to public policy; or, as described by the Judicial Committee of the Privy Council (referring to the case in 8 Moore), are considered to be immoral, and against public policy, and such as the law will not enforce here, and treat as void." And he held that, though such agreements were in a sense illegal, they did not amount to "an offence in India so as to give a right of action to a person who might sustain special damage from it, even if such an action might now be maintained against a person committing the offence of champerty in England."

It will now be convenient to refer to two cases before this Committee in which the subject has been to some extent considered. In the case referred in the 8th Moore, the Court below

[1] 8 Moo. I. A.

[2] 8 M. & W., 691.

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having held an agreement to be void for champerty, this tribunal thought the judgment to be wrong on the grounds that the point had not been raised by the pleadings, and also that the agreement was in no sense champertous, and this being so, their Lordships observed : "It was unnecessary to decide whether under the law which the Court was administering those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the Common Law and partly by Statute, are forbidden." But in the course of the judgment they made the following observations : "The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were enquiring was something which must have the qualities attributed to champerty or maintenance by English law ; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive is in the same sense necessary."

It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in England ; but they have been properly regarded in India as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

In the more recent case before this tribunal, *Cheda ebara Chetty* v. *Renga Krishna Muthu Vira Puchaiya Naichar* [1] in which a suit to enforce an unrighteous and champertous bond was dismissed, the following observations were made :—

With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in India is not the same as it is in England. The Statute of Champerty being part of the Statute Law of England, has of course no effect in the mofussil of India ; and the Courts of India do admit the validity of many transactions of that nature, which would not be recognized or treated as valid by the Courts of England. On the other hand the cases cited show that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir Barnes Peacock in the course of the argument, *viz.*, that administering, as they

[1] L. R., 1 I. A., 241.

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are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive."

The result of the authorities, then, appears to be that the English laws of maintenance and champerty are not of force as specific laws in India; and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly been whether they are in force in the Presidency towns, although the distinction between the Presidency towns and the mofussil has not been always borne in mind.

It is to be observed that the English Statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the Common Law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into at least comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. The principles on which the exclusion from India of special English laws rest are explained in the well-known judgment of *the Mayor of Lyons* v. *The East India Company*.[1]

It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the

[1] 1 Moo. I. A., 175.

legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the defendant, furnish reasons for holding that these special laws are inapplicable to these towns. There seems to have been always, to say the least, great doubt whether they were in force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

It would be most undesirable that a difference should exist between the law of the towns and the mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

But whilst their Lordships hold that the specific English law of Maintenance and Champerty has not been introduced into India, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of

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injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

Such, then, being the law on this subject in India, it fails to support the present action. It may be that the contract in this case is unconscionable, and one which ought not to have been enforced against the McQueens if their suit had been successful; but assuming this to be so, the plaintiffs, in their Lordships' view, have failed to establish that an action arises to them therefrom against the defendant for the losses and costs of the litigation. By the law of India, as above interpreted, the agreement did not constitute a punishable offence, and the action cannot therefore, as pointed out by the Chief Justice below, be sustained on the ground that where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved, nor does there appear to be any other principle upon which the action, under the circumstances as the present case, can be maintained. Whatever, therefore, may be the rights of the parties to the agreement as between themselves, their Lordships think that the High Court was right in holding that the action of the plaintiffs against a third party, founded on the alleged champerty, cannot be maintained.

There remains the question whether the action can be supported against the defendant, as being an actor in the suit, and having an interest in it. It is to be observed that a suit of this kind, in the absence of malice, and of the want of probable cause, is of first impression, no precedent for it having been found either in England or India. It may be assumed that, under the first agreement, the defendant acquired a contingent interest in the property, the subject of the suit to the extent of one-third share, besides the security for his advances; that he agreed to supply all the funds required to carry on the litigation, and that he obtained the virtual control of the proceedings; for although, under certain circumstances McQueen was to manage the suit, and in any case to assist in the management, the supreme control was to belong to the defendant, subject to a power of revocation by the McQueens on onerous terms, which was not exercised. But this state of things created no legal

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privity between the plaintiffs and the defendant, from which a promise can be implied on the part of the defendant to pay the present plaintiffs the costs of the former suit, on which an action of contract can be founded; nor does it establish a legal wrong, for the former suit, as already shown, was brought without improper motives, and upon reasonable cause. It has, however, been contended that it would be only in accordance with justice and equity that he who was the principal mover of a suit, and had an interest in it, should be made liable to the costs. It is obvious that a wide field of new litigation would be opened if, after the termination of the original suit another independent suit might, on such general grounds, be brought against third persons. Interminable questions would arise as to the degree of meddling and assistance which would create the liability. So far as precedents exist, it is either in the original suit itself, or the exercise of the summary jurisdiction of the Courts, that any such liability has been enforced. It is ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given. The now plaintiffs were fully aware, during the pendency of the former suit, of the arrangement between the McQueens and the defendant, but instead of applying for security for costs, they petitioned the Court to make him a co-plaintiff under the 73rd section of Act VIII. Without deciding whether this application was rightly rejected, it is enough to say that its rejection cannot give ground for an action which would not otherwise lie.

The instances in which persons other than parties to the suit have been held liable to costs in England, have been principally those of solicitors, over whom the Court exercises disciplinary jurisdiction, as in the case of *In re Jones*.[1] The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings; see *Hayward* v. *Giffard*.[2] But all these cases relate to

[1] L. R., 6 Ch., Ap. 497.
[2] 4 M. & W., 194.

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applications either in the cause itself, or to the summary jurisdiction of the Court.

A case in the High Court in Calcutta was much relied on by the appellant's counsel: *Bamasoondurie Dossee* v. *Anundolal Bose*.[1] There in a suit brought (in the original jurisdiction) to recover possession of land by a nominal plaintiff, Mr. Justice Phear, on a motion, made apparently in the suit, ordered the real plaintiffs to pay the costs. His judgment is placed mainly on the ground that the jurisdiction exercised by the English Courts in actions of ejectment was introduced into the original jurisdiction of the High Court, and was applicable to analogous actions brought to recover land there. The Chief Justice (Sir Barnes Peacock) in affirming this order on appeal, supported it not only on the ground on which Mr. Justice Phear's judgment rests, but on the circumstances of the case, which showed, as he thought, that there had been "a gross abuse of the powers of the Court, and a contempt of Court."

It is obvious that there is nothing in these judgments which gives support to the contention that an independent action will under such circumstances lie.

It was lastly insisted for the plaintiffs that if the costs in India were not recoverable, the action ought to be sustained for those incurred in the appeal to Her Majesty, subsequently to the purchase made by the defendant, pending that appeal, of all the rights of the McQueens in the property and the suit. Undoubtedly, the McQueens after this purchase became nominal appellants only, and the claim of the plaintiffs to recover these latter costs is as strong as a case of the kind can be. But even so, it is not stronger than many cases of ordinary occurrence, as, for instance, trustees suing on behalf of those beneficially interested, or the assignors of choses in action on behalf of their assignees; and in these, and similar cases which have long been familiar to the Courts whilst modes, such as requiring security for costs, have been devised for reaching the real party, no independent action for the costs against a stranger to the record has ever been sanctioned. Their Lordships, therefore, think that no distinction can properly be made between the costs of the appeal and the rest of the costs.

[1] Bourke's Rep. O. C. J. 45; and on appeal, p. 96.

It results from what has been stated, that by English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in the suit, in the absence of malice and want of probable cause. Consequently, if that law governs, the second ground on which it is sought to support the present action fails. And if the law administered in the mofussil is to be resorted to, the absence of all precedent in a case of such common occurrence affords an irresistable presumption that that no such action is maintainable there. In answer to the suggestion that if no precedent exists, it should now be made, it has been already pointed out that where there is neither privity of some kind nor a wrong, the principle upon which actions are ordinarily sustained is wanting. When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases "for which no specific rules may exist." Now, it appears to their Lordships to result from what has been already observed, the rules may properly be considered to exist which define the character of actions of this kind and the circumstances under which alone they can be brought, and that it would be out of place to resort to these general principles in dealing with such actions. The consequences of such a resort in cases of this character would be to make the law utterly uncertain, to raise, as before observed, interminable questions as to the degree of interference, which would sustain the action, and mischievously to multiply and perpetuate litigation after the termination of the original suit. Their Lordships, therefore, feel constrained to hold that in the absence of circumstances to convert the prosecution of the former suit into a wrong, the present action cannot be maintained.

It has been a misfortune to the plaintiffs that security was not obtained for the costs in the course of the former suit. Their Lordships also think that the defendant was to blame in not coming forward as the real party in the former appeal. Under these circumstances, whilst they must humbly advise Her Majesty to affirm the judgment appealed from, they will make no order as to costs.

Appeal dismissed.

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This decision laid down the principle that the English laws of maintenance and champerty are not of force as specific laws in British India, consequently a fair agreement to supply funds to carry on a suit in consideration of a share of the property if recovered, ought not to be regarded as *per se* opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid.

The same view has been re-affirmed by the Judicial Committee in *Ramlal* v. *Nilkanth*, I. L. R. 23 Calc. 843, L. R. 20 I. A. 112; *Achalram* v. *Kazim Hossain*, I. L. R. 27 All. 271, L. R., 32 I. A. 113; and *Bhagwat Dayal* v. *Debi Dayal*, 7 C. L. J. 335, I. L. R. 35 Calc. 420, L. R. 35 I. A. 48. In the case last mentioned, the Judicial Committee reversed the decision of the Calcutta High Court in I. L. R. 31 Calc. 433, and further held that whether the transaction was an unfair and unconscionable bargain for an inadequate price can be raised only as between assignor and assignee. It is further clear that if the transaction is sought to be avoided on equitable grounds, terms will be imposed upon the party who seeks relief, and the decree will be made conditional upon repayment of the sums which may be found to have been advanced for legitimate purposes.

BARWICK

v.

ENGLISH JOINT STOCK BANK.

[*Reported in L. R., 2 Ex., 259.*]

1867.
May, 18.

The judgment of the Court (Willes, Blackburn, Keating, Mellor, Montague, Smith and Lush, JJ.) was delivered by

WILLES J.—This case, in which the Court took time to consider their judgment, arose on a bill of exceptions to the ruling of my brother Martin at the trial that there was no evidence to go to the jury.

It was an action brought for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which the plaintiff alleged to have been committed by the manager of the bank in the course of conducting their business. At the trial, two witnesses were called, first, Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; and that he had done so upon a guarantee given to him by the bank, through their manager, the effect of which probably was, that the drafts of the plaintiff upon Davis were to be paid, subject to the debt of the bank. What were the precise terms of the guarantee did not appear, but it seems that the plaintiff became dissatisfied with it, and refused to supply more oats without getting a more satisfactory one; that he applied to the manager of the bank, and that after some conversation between them, a guarantee was given, which was in this form:—

"Dear Sir,—Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase for, J. Davis and Son not exceeding 1000 quarters of oats for the use of their contract, I will honour the cheque of Messrs. J. Davis and Son in your favour in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payment, except to this bank; and provided, as I explained to you, that they, J. Davis and Son, are able to continue their contract, and are not made bankrupts.

(*Sd.*) DON. M. DEWAR, *Manager.*"

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The plaintiff stated that in the course of the conversation as to the guarantee, the manager told him that whatever time he received the government cheque, the plaintiff should receive the money.

Now, that being the state of things upon the evidence of the plaintiff, it is obvious that there was a case on which the jury might conclude, if they thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably, or might probably, be paid, and that the plaintiff took the guarantee, supposing that it was of some value, and that the cheque would probably, or might probably, be paid. But if the manager at the time, from his knowledge of the accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended that it should not be paid, and kept back from the plaintiff the fact which made the payment of it improbable to the extent of being as a matter of business impossible, the jury might well have thought (and it was a matter within their province to decide upon) that he had been guilty of a fraud upon the plaintiff.

Now, was there evidence that such knowledge was in the mind of the manager? The plaintiff had no knowledge of the state of the accounts, and the manager made no communication to him with respect to it. But the evidence of Davis was given for the purpose of supplying that part of the case; and he stated that, immediately before the guarantee had been given, he went to the manager, and told him it was impossible for him to go on unless he got further supplies, and that the Government were buying in against him; to which the manager replied, that Davis must go and try his friends; on which Davis informed the manager that the plaintiff would go no further unless he had a further guarantee. Upon that the manager acted; and Davis added, "I owed the bank above 12,000*l*." The result was that oats were supplied by the plaintiff to Davis to the amount of 1227*l*., that Davis carried out his contract with the Government, and that the commissariat paid him the sum of 2676*l*., which was paid by him into the bank. He therefore handed a cheque to the plaintiff, who presented it to the bank, and without further explanation the cheque was refused.

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This is the plain state of the facts; and it was contended on behalf of the bank that, inasmuch as the guarantee contains a stipulation that the plaintiff's debt should be paid subsequent to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I speak sparingly, because we desire not to anticipate the judgment which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion, that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the Government cheque, by keeping back from the plaintiff the state of Davis's account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of.

If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect over-ruling the opinions of my brothers Martin and Bramwell in *Udell* v. *Atherton* [1] the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time [2]—but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit,

[1] 7 H. & N. 172; 30 L. J. (Ex.), 337.

[2] Hern v. Nichols, 1 Salk., 289.

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though no express command or privity of the master be proved.[1] That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo.[2] It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws.[3] It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong.[4] In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

The only other point which was made, and it had at first a somewhat plausible aspect, was this:—It is said, if it be established that the bank are answerable for this fraud, it is the fraud of the manager, and ought not to have been described, as here, as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in case for fraud, or whether, under the circumstances, money having been actually procured for and paid into the bank, which ought to have got into the plaintiff's hands, the count for money had and received is not applicable to the case. I do not discuss that question, because in common law pleading no such difficulty as is here suggested is recognized. If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in the

[1] Laugher v. Pointer, 5 B. & C., 547, at p. 554.

[2] Ewoank v. Nutting, 7 C. B., 797.

[3] Goff v. Great Northern Railway Company, 3 E. & E. 672; 30 L.J.Q. B., 148, explaining (at 3 E. & E., p. 683) Roe v. Birkenhead Railway Company, 7 Ex. 36; and see Barry v. Midland Railway Company, Ir. L. Rep. 1 C. L., 130.

[4] Huzzey v. Field, 2 C. M. & R., 432, at p. 440.

case of *Raphael* v. *Goodman*.[1] The sheriff sued upon a bond; plea, that the bond was obtained by the sheriff and others by fraud; proof, that it was obtained by the fraud of the officer; held, the plea was sufficiently proved.

Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, especially considering that the whole case may not have been before them, we think this is a matter proper for their determination, and there ought therefore to be a *venire de novo*.

Venire de novo.

NOTE.

The leading case is authority for the rule that the fraud of a servant or agent may be imputed to the master or principal, if the fraudulent act was done by the servant in the course of the master's business, or by the agent within the scope of the principal's authority, and for the benefit of the master or principal; conversely, the fraud of the servant cannot be imputed to the master, where the servant although acting in the course of the master's business is acting not for the master's benefit, but in pursuit of his own private ends. See *British Mutual Banking Association* v. *Charnwood Forest Ry. Co.* 18 Q. B. Div. 714. See also Bigelow on Fraud, Vol. I, p. 226.

[1] 8 A & E., 565.

KEIGHLEY, MAXSTED & Co.

v.

DURANT.

[*Reported in L. R., (1901) A.C., 240.*]

The following judgments were delivered :

1901. May, 20.

EARL OF HALSBURY L.C.—My Lords, there are here no facts really in dispute in this case. Roberts made a contract on his own behalf and without the authority of anybody else. The contract was made and the parties to it ascertained, and I am of opinion that upon no principle known to the law could the present appellants be made parties to that contract. They could, of course, make another contract in the same terms if they pleased, but it would not be this contract. It is suggested by the judgment of the Court of Appeal as possible, that what is described as ratification might, if the parties had so pleased, make the contract, which was one made between A and B, to include C as one of the contracting parties. I think such a suggestion is contrary to all principle, and for it there is no decision which calls for your Lordships to over-ride it, though I confess I should have no hesitation in doing so if there were. The parties to the contract, who have already bound themselves by it, are just as much part of the contract as any other part of the contractual obligations entered into.

I confess I do not see the relevancy of the argument that a contract might be made in the name of an unknown principal, and that such a principal may sue and be sued, though the name was not given at the time the contract was made. The fact is that in such a case the contract is made by him, and the disclosure afterwards does not alter or affect the contract actually made. Here it would alter the contract afterwards and make it a different contract. If it is said it is an anomaly, it certainly is not the only one in our law, and if it were sought to make our laws harmonious by deciding that any proposition which our laws establish involves as a necessary consequence the establishment of everything that is analogous to it, the result would be very perplexing indeed. I agree with the Master of

the Rolls that a long line of authorities has decided the question in favour of the view which he maintains.

My Lords, I should say no more but for Collins L.J.'s appeal to the Roman law, and with great respect for anything that falls from the Lord Justice, I cannot think that if the law were as there laid down it would help the present respondents. I do not think the passage in the Digest upon which he founds his argument refers to what we call ratification at all; but I wish to add that, if it could be clearly made out that it did so, I should not be much impressed by it. There are parts of the Roman law which undoubtedly we have made part of our own law, and they are binding on us, not because they are part of the Roman law, but because they have become part of our law. There are some countries which have made the Roman law their own, but in this country we have never adopted it in such a wholesale fashion. Hale, C. J., said the sources of the English law are as undiscoverable as the sources of the Nile, and although in our day such a phrase cannot be appropriately used, it was true in Hale's time. Our law differs in most important respects from the Roman law, and to quote the latter as an authority we must shew that it has become part of our own jurisprudence.

I move your Lordships that the judgment appealed from be reversed, and that the respondents do pay to the appellants the costs both here and below.

Lord Macnaghten.—My Lords, I am of the same opinion.

I dissent very respectfully from the judgments of the majority of the Court of Appeal, and I agree entirely with the Master of the Rolls.

It is said that there is no decision one way or the other. It is quite true that there is no reported case in which the precise question discussed in the judgments under review has been raised and determined, and it may be that Collins, L. J., is right in thinking that there is no *dictum* in which that question has been dealt with pointedly and advisedly. But there is a stream of authority all tending in one direction, which it is impossible, I think, to gainsay or resist, and which

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has been treated as conclusive by text-writers of acknowledged eminence both in this country and in America. And when your Lordships are told that there is no actual decision, nor even any carefully considered expression of opinion in favour of the view which the Master of the Rolls took to be settled law, I cannot help recalling the observation of a great judge: "The clearer a thing is," said James, L. J., "the more difficult it is to find any express authority or any *dictum* exactly to the point." [1]

My Lords, I will not trouble you by going through the roll of cases bearing upon the question. It would be impossible, I think, with advantage to add anything to the very able and exhaustive review of the Master of the Rolls. I will only say a few words in reference to the two grounds on which his conclusion is challenged by Collins, L. J. Having satisfied himself that the case was not governed by authority, the learned Lord Justice ends his judgment by declaring that he was bound to decide in accordance with what he regarded to be "principle and common sense."

In appealing to common sense, I do not for a moment suppose that Collins, L. J., meant to intimate that the conclusion at which he had arrived, believing himself to be untrammelled by authority, was a self-evident proposition which ought to command the assent of all sensible persons. Admittedly, Lord Cairns and Lord Esher, both sensible persons I should say, took the other view. I rather suppose that the learned Lord Justice meant to appeal to considerations of convenience. But it is difficult to understand how this new departure, if it be a new departure, can be required by any consideration of that sort, seeing that in all these years the question has never before presented itself for decision but once, and then the case was decided on other grounds.

With all deference, I much doubt whether the decision under appeal is in accordance with good sense, whatever that expression means. Still less do I think it is in accordance with principle.

As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorized agent, can sue

[1] (1875) L. R., 10 Ch., 526.

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or be sued on the contract. A stranger cannot enforce the contract, nor can it be enforced against a stranger. That is the rule ; but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in English law. That doctrine is thus stated by Tindal, C. J., in *Wilson* v. *Tumman* [1] : "That an act done, *for another*, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his *previous* authority." And so by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else? If Tindal C. J.'s statement of the law is accurate, it would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intention locked up in his own breast ; for it cannot be said that a person who so conducts himself does assume to act for any body but himself. But ought the doctrine of ratification to be extended to such a case? On principle I should say certainly not. It is, I think, a well-established principle in English law that civil obligations are not to be created by, or founded upon, undisclosed intentions. That is a very old principle. Lord Blackburn, enforcing it in the case of *Brogden* v. *Metropolitan Ry. Co.*,[2] traces it back to the year-books of Edward IV (17 Edw. 4, 2, pl. 2) and to a quaint judgment of Brian, C. J. : "It is common learning," said that Chief Justice, who was a great authority in those days, "that the thought of a man is not triable, for the Devil has not knowledge of man's thoughts." [3] Sir E. Fry quotes the

[1] (1843) 6 M. & G., at p. 242.

[2] (1877) 2 App. Cas., at p. 692.

[3] In the original thus : "comen erudition est of q l'entent d'un home ne serr trie, car le Diable n'ad conusance de l'entent de home."

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same observation in his work on Specific Performance, s. 295, p. 133, 3rd ed. It is, I think, a sound maxim—at least, in its legal aspect: and in my opinion it is not to be put aside or disregarded merely because it may be that, in a case like the present, no injustice might be done to the actual parties to the contract by giving effect to the undisclosed intentions of a would-be agent.

My Lords, I have nothing more to add on the question of principle. But I should like to say a word or two about the case of *Bird* v. *Brown*,[1] on which Collins, L. J., seems to place his chief reliance. The case is instructive, I think, and useful, because it tends to shake one's confidence in the infallibility of reports, which always seem to carry the more weight the less opportunity there is of testing their accuracy. Why should an obscure report be taken for gospel merely because it is old? *Bird* v. *Brown* [1] was heard by four judges. Only one judgment was given. The Exchequer Reports attribute the judgment to Rolfe B. The Law Journal ascribes it to Parke B. The Jurist puts it in the mouth of Pollock C. B. No one gives it to the fourth Judge; but then there were only three sets of reports current at the time. The weekly Reporter did not begin till later.

The passage in the Exchequer Reports on which the learned Lord Justice relies begins with these words: "If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be." So far no exception can be taken to the language of the learned Judge, whoever he was. Then follows this sentence, on which Collins, L. J., lays a stress, denoted by italics, in his printed judgment: "or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had

[1] (1850) 4 Ex., 786; 19 L. J. (N. S.) Ex., 154; 14 Jur., 132.

against A. B." Now, I cannot understand that. The assumption is that A. B., unauthorised by me, has made a contract on my behalf with J. S. Why J. S. should not believe that A. B. was acting for me, when A. B. said he was, I do not understand, nor can I see why his want of belief should give him a right to sue A. B. as principal when the contract was made on the representation that A. B. was not principal. The sentence reads like an irrelevant gloss which has crept into the text. I think there must be some mistake somewhere, and it is consolation to one who is greatly puzzled by the passage to find that it does not occur in the report of the case in the Law Journal.

I think the appeal must be allowed.

Lord Shand.—My Lords, I am also of opinion that the judgment of the Court of Appeal should be reversed, and the respondent's action dismissed; but as your Lordships' opinions deal so exhaustively with the grounds of judgment on which the decision of the case depends, I propose to make only a very few observations.

It may be assumed that Roberts, in the contract he made with the respondents, intended to buy, and did buy, on the joint account of himself and the appellants, hoping and expecting that the appellants would, when informed of the terms of his purchase, ratify or adopt the transaction as on joint account. The evidence of this is certainly meagre and unsatisfactory, and involves, as I think, the admission of the entry made in Roberts' book, to which the appellants were no parties, and which was not evidence of contract against them. But at the utmost the respondents can only plead that he has proved by his own testimony that in buying he did so on the joint account, in the hope and expectation that the appellants would adopt or ratify the transaction.

On the other hand, it is clear that Roberts made no suggestion that he was acting for any one but himself, or even that he had hope or expectation that the appellants would be parties to the contract. The contract was made avowedly for himself alone, and not on the statement that he acted on behalf of any principal, or joint contractor, or proposed joint contractor with himself. And it is equally clear that he had no authority from the appellants to make any contract for them, or to

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make any contract in which they would be interested, for he agreed to pay a price which was in excess of that which the appellants were prepared to give. It is to be further noted that it cannot be said or suggested that the appellants, by any communication with the respondents, or by their conduct in relation to the respondents by any dealing with them, ratified or adopted their contract with Roberts, so as in a question with them to entitle the respondents on any such ground to maintain that the appellants had become liable on contract to them.

The question which arises on this state of the facts is whether, where a person who has avowedly made contract for himself (1) without a suggestion that he is acting to any extent for another (an undisclosed principal), and (2) without any authority to act for another, can effectually bind a third party as principal, or as a joint obligant with himself, to the person with whom he contracted, by the fact that in his own mind merely he made a contract in the hope and expectation that his contract would be ratified or shared by the person as to whom he entertained that hope and expectation. I am clearly of opinion, with all respect to the majority of the Court of Appeal, that he cannot. The only contract actually made is by the person himself and for himself, and it seems to me to be conclusive against the argument for the respondents, that if their reasoning were sound it would be in his power, on an averment of what was passing in his own mind, to make the contract afterwards either one for himself only, as in fact it was, or one affecting or binding on another as a contracting party, even although he had no authority for this. The result would be to give one of two contracting parties in his option, merely from what was passing in his own mind and not disclosed, the power of saying the contract was his alone, or a contract in which others were bound with him. That, I think, he certainly cannot do in any case where he had no authority, when he made the contract, to bind any one but himself.

I have only to add that, for the reasons stated by my noble and learned friend Lord Robertson, I do not think the Roman Law gives any support to the judgment of the Appeal Court.

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LORD JAMES OF HEREFORD.—My Lords, the facts in this case are not in dispute and I do not purpose referring to them in detail. The grounds upon which I have arrived at the conclusion that the judgment of the Court of Appeal should be reversed can be shortly stated.

Roberts, the so-called agent, entered into a contract with the respondents for the purchase of two quantities of wheat. When doing so he had no principal—he made the contract for himself alone. The cause of action in this case is founded upon the statement made by Roberts, that at the time he made the contract he had mentally formed the intention to offer to the appellants the option of ratifying the contract and becoming parties to it. But no notice of this intention was given to the respondents: they contracted with Roberts alone, and knew no one else. They knew of no disclosed principal other than Roberts, and there was no undisclosed principal—no such person existed. But the day after Roberts had made the contract for himself he met the agent for the appellants, who agreed to share the contract with Roberts.

The question is, Does this latter agreement amount to a ratification of the contract between Roberts and the respondents? In my judgment, it does not. Common sense and authority are alike opposed to it.

Doubtless a person can confirm and ratify a contract which was in fact made on his behalf. But an undisclosed principal must exist at the time of the contract. He cannot be brought into life as a principal after the contract has been made without any recognition of his existence. No doubt a third person, by agreement with one of the principals, may, as between those two persons, take an interest in the contract; but that subsidiary contract does not create any privity between the third person and the other principal to the original contract. To establish that a man's thoughts, unexpressed and unrecorded, can form the basis of a contract so as to bind other persons and make them liable on a contract they never made with persons they never heard of, seems a somewhat difficult task. Hitherto a man's untold thoughts have been regarded to be of a merely nominal value, and the offers generally made for them certainly do not represent large sums of money. If the judgment of the

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majority of the Court of Appeal be right, these hidden thoughts may represent very large sums of money.

An interesting academic discussion took place at the bar for the purpose of discovering the effect of certain passages to be found in a portion of the civil law. Whatever the effect of these quotations from the Digest may be, they cannot do more than throw light upon the meaning of doubtful passages in our own law, and I cannot discover that there are doubts requiring solution in the law of this country affecting this case. The learned Master of the Rolls has in his judgment very laboriously and clearly traced the authorities bearing upon the subject of ratification.

In the case of *Saunderson* v. *Griffiths* [1] Holroyd, J., I think very correctly stated the following proposition: "It was said, however, that A at a subsequent time assented to the agreement, and that such subsequent assent made it his agreement *ab initio*. There might have been weight in that argument if the agent, when he made the agreement, had professed to have authority to act for A, because then the subsequent ratification would have been a recognition of the authority which the agent assumed to have when he made the agreement. But here A never previously authorized the agent to make the agreement on his behalf, nor is he named as a party for whom the latter professed to act."

This judgment, delivered more than seventy years ago, has been followed by many most eminent Judges in the cases quoted by the Master of the Rolls in his judgment, and placed before your Lordships by counsel at the bar. Fully accepting the principles laid down by Holroyd, J., I concur in the views already expressed by your Lordships, that they should be applied to this case, and that, therefore, the judgment of the majority of the Court of Appeal is erroneous and should be reversed.

Lord Davey.—My Lords, the facts necessary to raise the question of law on which the learned Judges have differed may be thus stated: Roberts made a contract in his own name to purchase a large quantity of wheat from Durant & Co., the present respondents. Roberts bought on his own account, and without any authority from the appellants to buy the wheat on

[1] (1826) 5 B. & C., 909.

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joint account with them, but (it may be assumed for the purpose of the present judgment) intending that the appellants should have the benefit of the contract on joint account with himself, if they chose to accept it, and hoping and expecting that they would do so. The appellants did afterwards agree with Roberts to take to the purchase on joint account with him. Roberts was unable to fulfil his contract, and thereupon the respondent sued the appellants as undisclosed principals. At the close of the plaintiff's case the learned counsel for the appellants submitted that there was no case, and, after some argument, Day, J., gave judgment for the appellants, holding that there had been a failure to prove any ratification by them—meaning, as appears from what he had previously said, that no ratification was legally possible in the circumstances.

The question of law, therefore, is, whether a contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of, a principal, but having an undisclosed intention to give the benefit of the contract to a third party, can be ratified by that third party, so as to render him able to sue or liable to be sued on the contract. In the course of his judgment Collins, L. J., says that the point has never been actually decided, though he admits there are numerous *dicta* upon it which have become the foundation of statements in text-books more or less adverse to the present respondent's contention, and he says that the question must now be determined on principle.

The learned Lord Justice does not cite a single judicial statement of the doctrine of ratification, or any single statement of it by text-writers, which is in favour of his view. So far as authority is concerned, he is driven to rely upon some words attributed in the Exchequer Reports to Lord Cranworth (then Rolfe B.) in *Bird* v. *Brown* [1] and a case of *Soames* v. *Spencer*.[2]

In *Bird* v. *Brown* [1] Lord Cranworth stated the general doctrine thus: "If A. B., unauthorised by me, makes a contract on my behalf with J. S. which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards

[1] 4 Ex., 786; 19 L. J. (N. S.) Ex., 154.
[2] (1822) 1 D. & R., 32; 24 R. R., 631.

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agree to admit that such was the case, J. S. is precisely in the condition in which he meant to be." The statement of the doctrine is, so far, entirely in favour of the appellants' contention; but Lord Cranworth is reported to have added: "or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had against A. B." These are the words relied on by the Lord Justice. They are not to be found in the report of the case in the Law Journal, where the judgment is attributed to Parke B. Lord Cranworth, if he was the author of these words, or if the words were really used, may have been thinking of the class of cases where a person contracts professedly on behalf of a principal but without naming him (as was said by Willes, J., in *Watson* v. *Swann* [1] and see *Lyell* v. *Kennedy*.[2] This interpretation would satisfy his language, or he may have overlooked the point now in question; I do not know. But whatever Lord Cranworth may have said or intended, the words relied on are not sufficient to raise a doubt in my mind as to the accuracy of the statement of the law by other learned Judges. The case of *Soames* v. *Spencer* [3] may perhaps be explained on the principle that fraud will not be presumed, and therefore a man who assumes to sell another person's property really professes to be acting for the true owner. But, however this may be, the point now before your Lordships does not appear to have been raised or argued.

On the other hand, the Master of the Rolls has cited a large number of cases, extending over a period of seventy years or more, and containing the opinions of such Judges as Lord Wensleydale, Tindal, C. J., Erle, C. J., Willes, J. and Lord Bowen. These eminent persons all state the law one way. I refer in particular to *Vere* v. *Ashby* [4]; *Wilson* v. *Tumman* [5]; *Watson* v. *Swann* [1]; *Falcke* v. *Scottish Imperial Insurance Co.*.[6]

[1] (1862) 11 C. B. (N.S.), 756.
[2] (1889) 14 A. C., 437, at p. 456.
[3] 1 D. & R., 32; 24 R. R., 631.
[4] (1829) 10 B. & C., 298; 34 R. R., 408.
[5] 6 Man. & G., 236.
[6] (1886) 34 Ch. D., 234.

I do not think that the propositions of law to be found in these cases can be brushed aside as mere *dicta*. *Watson* v. *Swann*,[1] for example, was an action upon a policy of insurance entered into by one John Smith in his own name. Erle, C. J., says: "It is clear law that no one can sue upon a contract unless it has been made by him, or has been made by an agent professing to act for him, and whose act has been ratified by him. Now, here the contract was not made by the plaintiff, nor did it purport to be made on his behalf; it purported to be made by Smith on his own behalf." Willes, J., adds: "It is not necessary that he should be named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract."

Story on Agency and Kent's Commentaries were also referred to. Section 251A of the former work contains a very full statement of the doctrine, and shews that the learned author understood the law in the same way as the learned Judges already quoted or referred to. I think Mr. Carver successfully shewed that s. 251A is in the language of story himself. To these authorities should be added the learned note of Mr. Serjeant Manning to the case of *Wilson* v. *Tumman*.[2]

The weight of authority is therefore against the opinion of the learned Lords Justices, and I may be permitted to add that an examination of the cases has confirmed my own previous impression of what the law is upon the point in question. It appears from a note in Smith's Leading Cases to *Armory* v. *Delamirie*[3] that the point now taken was raised in an unreported case of *Matheson* v. *Kilburn*, and that Lord Cairns and Brett, L J. (Cockburn, C. J., dissenting) were of opinion that a contract made by one on his own behalf, though intending to buy on behalf of a third person but without authority from him, was incapable of ratification by that third person. It is, however, stated that the case went off on the failure to prove the alleged intention.

I might content myself with these grounds for my judgment; but Collins, L. J., has given reasons for his opinion that this case

[1] (1862) 11 C. B. (N.S.), 756.
[2] 6 Man. & G., 236 at p. 239.
[3] 1 Sm. L. C., 10th ed., p. 340.

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ought to be decided otherwise on principle and (to use his own expression) common sense, and has also referred to the Roman law on the subject. I will out of respect to him shortly state my views upon this portion of his judgment. The argument seems to be that as the law permits an undisclosed principal, on whose behalf a contract has been made, to sue and be sued on the contract, and as the effect of ratification is equivalent to a previous mandate, a person who ratifies a contract intended but not expressed to be made on his behalf is in the same position as any other undisclosed principal. Further, it is said that whether the intention of the contractor be expressed or not, its existence is mere matter of evidence, and once it is proved the conclusion ought to follow. Romer, L. J., held that on prineple it ought to be held that ratification (in the case before the Court) is possible, and that to hold the contrary would be to establish an anomaly in the law, and moreover a useless one. My Lords, I cannot agree. There is a wide difference between an agency existing at the date of the contract which is susceptible of proof, and a repudiation of which by the agent would be fraudulent, and an intention locked up in the mind of the contractor, which he may either abandon or act on at his own pleasure, and the ascertainment of which involves an inquiry into the state of his mind at the date of the contract. Where the intention to contract on behalf of another is expressed in the contract, it passes from the region of speculation into that of fact, and becomes irrevocable. In what sense, it may be asked, does a man contract for another, when it depends on his own will whether he will give that other the benefit of the contract or not? In the next place, the rule which permits an undisclosed principal to sue and be sued on a contract to which he is not a party, though well settled, is itself an anomaly, and to extend it to the case of a person who accepts the benefit of an undisclosed intention of a party to the contract would, in my opinion, be adding another anomaly to the law, and not correcting an anomaly.

The passages in the Digest cited by the Lord Justice are from Dig. III. tit. 5, *De negotiis gestis*. If the whole of the title be read, it does not appear to me to bear out the meaning placed upon it by the Lord Justice, and I can find no warrant for

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the gloss put by him on the words *meâ contemplatione* and *meo nomine*. I need not, however, pursue this topic, because I believe that one of your Lordships will discuss it with a fuller knowledge of Roman law than I can command.

I am therefore of opinion that the appeal should be allowed.

Lord Brampton (after stating the facts).—My Lords, it was not suggested that in any of the several telegrams in which the contract was contained, or in other way, Durant was made aware, or that Roberts ever hinted to him, that in making it he was acting by the authority, or on behalf, of an undisclosed principal. Had he so made it—though at that time no authority from Keighleys was then in existence—Keighleys might have ratified and adopted it, and having done so both they and Durant would have been as responsible upon it, each to the other, as if Keighleys had been a party to it from the beginning; but as this contract was clearly not so made, but was a simple written contract between Durant, the vendor, and Roberts, acting apparently for himself only, as vendee, it could not be so ratified by Keighleys, for there was no contract open for them to ratify; and it could not have been adopted by them, for after a contract has been finally concluded between two persons it cannot be altered so as to make a third person liable upon it. If this is desired, it must be done through the medium of a new contract.

But it is said for the plaintiff that when Roberts made his contract he had within his mind an intention, though he never communicated or disclosed it to anybody, to make it on the joint account of Keighleys and himself, and that such secret intention was quite sufficient to empower Keighleys to ratify or adopt it. I cannot assent to this view. I have always been under the impression that a concurrence of intention was an essential element of a contract. Nobody can doubt that it is essential in making an agreement to ascertain who are then intended to be made parties to it. It is impossible in construing a contract to give any weight to such a reserved intention as that suggested in this case; to do so would be to open wide a doorway to fraud and deception; and it would necessitate the addition of the doubtful science of thought-reading to the requirements of a mercantile education. I reject, therefore, this doctrine of mental reservation, and strip from the case the element of secret intention.

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The case then is reduced to this: that there is a contract between Roberts and Durant simply, to which it was never avowedly contemplated that Keighleys should be parties. Neither Keighleys nor Durant could make the former liable by adoption or ratification of a contract to which, when it was concluded, it was not in contemplation of themselves or Durant that they should or could be so. This action, therefore, which is based on a contract to which Keighleys were not parties, must fail.

I say nothing about any new contract which it was open for the parties, or any of them, to have made if they had so thought fit—a new contract between themselves. It may or may not be that some contract between Roberts and Keighleys might have been formulated out of the interview with Wright on May 12 at Manchester. I am now dealing only with the contract made on the 11th between Roberts and Durant, to which, in my opinion, the appellants (Keighleys) could not make themselves, or be made by Durant, parties.

I will not detain your Lordships by again referring to the numerous cases cited at the bar, nor to those so fully discussed by the Court of Appeal; in addition to these, I desire only to refer to that of *Kelner* v. *Baxter* [1] decided by Erle, C. J., and Willes, Byles, and Keating, JJ. I agree in the judgment of the present Master of the Rolls in the Court of Appeal. It follows that, with all respect to the opinions expressed by the majority of that Court, I cannot concur in their views. In my opinion, therefore, the judgment of the Court of Appeal should be reversed, the judgment of Day, J., restored, and this appeal allowed with costs.

Lord Robertson.—My Lords, after so much has been said in which I agree, I shall confine my observations to the briefest statement of my view of the case generally, and a few remarks on the inferences which have been drawn from certain texts of the civil law.

With the Master of the Rolls, and in his words, I hold that, "unless the contract made by the unauthorized agent purports or professes.....to have been entered into on behalf of another .....then that contract made by the unauthorized agent was

[1] (1866) L. R., 2 C. P., 174.

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not capable of being ratified by a stranger to it." To speak of the "purporting or professing" as if this were one condition, more or less, of ratification, seems to me to be rather an understatement. All are agreed that there must be some special relation between the ratifier and the contract other than and antecedent to his claiming the contract. To hold otherwise would be to admit extravagant results. It seems to me that the whole hypothesis of ratification is, that the ultimate ratifier is already in appearance the contractor, and that by ratifying he holds as done for him what already bore, purported or professed to be, done for him. There is, as it seems to me, no room for ratification (unless all the world may ratify) until the credit of another than the agent has been pledged to the third party. Whether the unauthorized agent be marked out as an agent by what he says, or by what he wears, is, of course, a mere matter of circumstance and of evidence; but an agent he must be known to be, and as agent he must act. On the other hand, the only theory consistent with the respondents' argument is, that the essential condition is that the person making the contract did so in a state of mind which may more accurately be described as hope than intention, that the person who *ex hypothesi* ultimately "ratifies" would "ratify." The difficulty of stating this theory, and the difficulty of working it, having regard to its basis being unexpressed and very likely half-formed expectations, are not indeed conclusive objections, but they challenge scrutiny of supposed origin of the theory. And this leads me to what Collins, L. J., has said about the civil law.

Now it is remarkable that, the question in hand being the ratification of contracts, nothing that is cited from the civil law relates to contracts. The passage first and mainly relied on by Collins, L. J., relates to the exaction of a debt by a *negotiorum gestor*. Now I agree that in the text importance is attached to the *contemplatio* with which the *negotiorum gestor* had acted. But, in order to ascertain the relevancy of this element, it is necessary to grasp the thesis of the long discussion of which the passage cited is a mere episode. The question being discussed is: In what cases shall a person interfering in the affairs of an absent man have an action (for re-imbursement or the like) against that man? And one of the conditions of this purely equitable

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remedy (allowed by the liberality of the later Roman law) is that the intervention shall have been really a friendly intervention in the interest of the absent *dominus*, and not a selfish intervention truly in the interest of the intervener himself or of a third party. In that question the *contemplatio* is of essential relevancy, while the avowal of it is of no relevancy at all except as evidence. Accordingly, in the case of Seius, the *negotiorum gestor* has his remedy because, although it turns out that the true creditor of the man who was made to pay was some one else altogether, yet the intervention was motived by regard to the interest of the other, who made it his own by ratifying. In this case, as throughout this part of the Digest, the argument is as to the relations between the *negotiorum gestor* and the absentee, not as to the relations between the *negotiorum gestor* and the third party, and there is, therefore, no occasion for any analysis of ratification. In the passage cited, the act ratified, not having been a contract, there is not even (as I view it) an incidental elucidation of the present controversy; but it is difficult to suppose that the debtor paid except to a professed agent of the supposed *dominus*, and we know that as matter of practice a *negotiorum gestor* had to give security *ratam rem dominum habiturum*. The other texts from the Digest cited by Collins, L. J., relate to torts, and the juridical considerations which ought to determine liability or non-liability for a tort acceded to *ex post facto* by the person in whose interest it has been committed are not the same as apply to a man being introduced into a contract with a third party, although the word ratification and its Latin equivalents may with propriety be applied to describe his accession in the one case as well as in the other. But again I must add that I fail to find in any of those passages any discussion of the question now agitated, or anything implying that the person injured did not know that the wrong was done in the service of the person who ultimately ratifies.

On these grounds I must respectfully decline to hold that the civil law supports the judgment appealed against.

Lord Lindley.—My Lords, I do not propose to trouble the House by stating the facts or by examining in detail the numerous authorities cited in the course of the argument. I propose to confine my observations to what appear to me to be

the real difficulties in the case, and to the legal doctrines involved in it.

So much turns on the position of undisclosed principals that I will first say a few words about them.

The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority is, that the contract is in truth, although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made; and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what is true in fact, although that truth may not have been known to the other contracting party.

At the same time, as a contract is constituted by the concurrence of two or more persons and by their agreement to the same terms, there is an anomaly in holding one person bound to another of whom he knows nothing and with whom he did not, in fact, intend to contract. But middlemen, through whom contracts are made are common and useful in business transactions, and in the great mass of contracts it is a matter of indifference to either party whether there is an undisclosed principal or not. If he exists it is, to say the least, extremely convenient that he should be able to sue and be sued as a principal, and he is only allowed to do so upon terms which exclude injustice.

The reasons upon which a real principal not disclosed can sue or be sued on a contract made on his behalf by an agent acting with his authority have no application to contracts made by one person for another, but without any authority from him. Some other reason must be found to permit a person to sue or be sued upon a contract not entered into by him through an agent or otherwise.

The principle relied on, and the only principle which by our law can be invoked with any chance of success, is that known as ratification, by which an approval of what has been done is sometimes treated as equivalent to a previous authority to do it. The mere statement of the general nature of what is meant by ratification shews that it rests on a fiction. Where a man acts with an authority conferred upon him, no fiction is introduced;

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but where a man acts without authority and an authority is imputed to him a fiction is introduced, and care must be taken not to treat this fiction as fact.

It is not necessary to write a treatise on the doctrine of ratification in order to dispose of this case. Historically that doctrine is no doubt derived from the Roman law; but it has been extended and developed in this country conformably to our own legal principles and to meet our own commercial necessities; and it is to our own decisions rather than to the Digest and commentaries upon it that English Courts must look for guidance. It is well known that in matters of contract we pay far less attention judicially to unexpressed intentions than is paid to them in other countries which have followed the Roman law more closely than we have: see *Byrne* v. *Van Tienhoven*.[1]

Roberts' evidence, on which the case turns, may be summed up by saying that it amounts to one or other of the two following statements, namely: (1) That he intended to buy, and did buy, as a principal, hoping and expecting that Keighley, Maxsted & Co. would afterwards join him in his speculation; or (2) that he intended to buy, and did buy, on the joint account of himself and Keighley, Maxsted & Co. as principals, hoping and expecting that they would, when informed of what he had done, ratify the transaction.

The first of these views of his evidence will not avail the plaintiffs; for in this view Roberts' contract, not having been made for Keighley, Maxsted & Co. as possible principals, will not admit of ratification by them. The plaintiffs' counsel did not contend that it would, and they did not press the first view in argument.

The second view is not open to this objection, and ought to be left to a jury if there is any evidence that Roberts not only intended to buy, but did buy, on the joint account of himself and Keighley, Maxsted & Co. He swears that he did; so far as his intention is concerned, I will give him credit for what he says, but I am unable to discover any evidence of anything more.

Had Keighley, Maxsted & Co. authorised Roberts to buy for them there would have been a contract in fact, although Durant

[1] (1880) 5 C. P. D., 344.

& Co. did not know of them and did not intend to sell to them. This is, no doubt, an anomaly, as already pointed out; but there is a reality behind it. To apply the same sort of reasoning to a different state of facts from which the reality is absent is to go further than any existing authority, and to extend a fiction further than is required by those necessities or conveniences of trade which led to its introduction.

The doctrine of ratification as hitherto applied in this country to contracts has always, I believe, in fact given effect in substance to the real intentions of both contracting parties at the time of the contract, as shewn by their language or conduct. It has never yet been extended to other cases. The decision appealed from extends it very materially, and I can find no warrant or necessity for the extension.

I have examined all the authorities referred to in the judgments of the Court of Appeal, and those cited by counsel in this House, and with two apparent exceptions they are all, in my opinion, adverse to the plaintiffs. One exception is the passage in *Bird* v. *Brown*,[1] which has been already commented on, and which I do not clearly understand. The other apparent exception is *Soames* v. *Spencer*,[2] which, when examined, does not really help the plaintiffs. There, one of two co-owners of oil sold the oil to the defendants. The buyers—*i.e.*, the defendants—apparently did not know that the oil did not wholly belong to the seller. When informed that there was a co-owner who objected to the bargain, the defendants insisted that he was bound by it, and he acquiesced in their view. Both parties treated the contract as if made between both owners, as sellers, and the buyers. Afterwards, when sued by both co-owners for not accepting the oil, the defendants—*i.e.*, the buyers—changed their tactics, and contended that there was no ratification, and no contract in writing, to satisfy the Statute of Frauds. It is plain from the judgment of Abbott, C. J., that the conduct of the defendants themselves removed any real difficulty as regards ratification which otherwise might have arisen.

It may be that if one of several co-owners of a chattel sells it, without the authority of his co-owners, to a person who

[1] 4 Ex., 786. [2] 1 D. & R., 32; 24 R. R., 631.

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believes he is dealing with the sole owner of the property sold, the transaction can be ratified by the undisclosed co-owners, and that they can then sue or be sued on the contract as undisclosed principal. Their interest in the property may justify this view. In *Soames* v. *Spencer* [1] it was assumed rather than decided that ratification in such a case is possible, and I am far from saying that it is not. The co-ownership shews that the seller, if acting honestly, must in fact have been acting for his co-owners as well as for himself. His intention is supplemented by a fact which completes the proof of what is necessary. In the present case there is no co-ownership, which was the foundation of the decision in *Soames* v. *Spencer*,[1] and consequently the decision when carefully looked at is not really an authority for the plaintiffs.

That ratification when it exists is equivalent to a previous authority is true enough (subject to some exceptions which need not be referred to). But, before the one expression can be substituted for the other, care must be taken that ratification is established.

It was strongly contended that there was no reason why the doctrine of ratification should not apply to undisclosed principals in general, and that no one could be injured by it if it were so applied. I am not convinced of this. But in this case there is no evidence in existence that, at the time when Roberts made his contract, he was in fact acting, as distinguished from intending to act, for the defendants as possible principals, and the decision appealed from, if affirmed, would introduce a very dangerous doctrine. It would enable one person to make a contract between two others by creating a principal and saying what his own undisclosed intentions were, and these could not be tested.

To return to the question whether there was any evidence proper to be left to the jury which would justify a verdict in favour of the plaintiffs against Keighley, Maxsted & Co., I am of opinion that there was none. There was no evidence of any purchase by Roberts for Keighley, Maxsted & Co., as expected principals, except (1) what he says of his own intention; (2) what he says about the telegram he afterwards sent to Keighley, Maxsted & Co.; and (3) his own entry in his own book.

[1] 1 D. & R., 32; 24 R. R., 631.

Assuming all this to be admissible for any purpose, what Roberts intended was never disclosed to Durant & Co., and cannot be inferred from the nature of the transaction itself. His intention, therefore, cannot be allowed to affect the rights of the parties. What he afterwards did, unknown to Durant & Co., cannot in any way affect their position. The appeal, therefore, in my opinion, ought to be allowed with costs here and below.

Order appealed from reversed and judgment of Day, J., restored, with costs here and below.

NOTE.

In this case the HOUSE OF LORDS reversed the decision of the majority of the Court of Appeal (Collins and Romer L. JJ.,) and affirmed the decision of the minority (A. L. Smith L. J.) ; (1900) 1 Q. B., 629.

The decision lays down the important principle that a contract made by one professing to act on his own behalf though at the time he has the intention of giving the benefit of the contract to an undisclosed principal, cannot be ratified by that person so as to give him the status of principal and the right to sue on the contract, unless in some way, the principal's name was used in the first instance. The reason for the rule is that the first essential to an agency by ratification is that the agent shall not be acting for himself, but shall intend to bind a named or ascertainable principal and one who is actually in existence at the time when the act is done.

It has been suggested that the legal analysis of the position is : that the agent offers to act as such, and, assuming his offer to be accepted, proceeds to act as agent. The intended principal may decline or omit to accept the offer ; but, if he accepts it, his acceptance relates back to the date of the offer.

For an application of the principle to a case in this country, see *Ghasiram* v. *Raja Mohan Bikram*, 6 C. L. J. 639.

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[*Reported in 1 Sm. L. C., 167 ; 2 Lord Raymond, 909.*]

The following judgments were delivered :

Gould, J.—I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way ; and that any man, that undertakes to carry goods, is libable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage ; and if a *præmium* be laid to be given, then it is without question so. The reason of the action is, *the particular trust reposed in the defendant, which he has concurred by his assumption,* and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum*. So is the 3 Hen. 6, 36. So if goods are deposited with a friend, and are stolen from him, no action will lie ; 29 Ass. 28. But there will be a difference in that case upon the evidence how the matter appears : if they were stolen *by reason of a gross neglect in the bailee*, the trust *will not save* him from an action ; *otherwise*, if there *be no* gross neglect. So is Doct. et Stud. 129, upon that difference. The same difference is, where he comes to goods by finding ; Doct. et Stud. *ubi supra* ; Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is Keilw. 160 ; 2 Hen. 7, 11 ; 22 Ass. 41 ; 1 R. 10 ; Bro., Action sur le case, 78. *Southcote's Case* is a hard case indeed to oblige all men, that take goods to keep, to a special acceptance that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of ; and indeed it appears by the report of that case in Cro. Eliz. 815, that it was adjudged by two Judges only, *viz.*,

[1] S. C., Com. 133 ; 1 Salk., 26 ; 2 Salk., 735 ; 3 Salk., 11 ; Holt, 13, 131, 528 ; 3 Ld. Raym., 163. There is a report of this case *tot. verb.*, in the Hargrave Mss., No. 66, and 182, therein said "to be transcribed from the Mss. Reports of Herbert Jacob, Esq., of the Inner Temple, written with his own hand."

Gawdy and Clench. But in 1 Vent. 121, there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30*l.*; the defendant showed that he locked the money up in his master's warehouse, and it was stolen from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms.

Powys, J., agreed upon the neglect.

Powell, J.—The doubt is, because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend, when there is not any particular neglect shown. And I hold, an action will lie, as this case is. And in order to make it out, I shall *first* show that there are great authorities for me, and none against me; and then, *secondly*, I shall show the reason and *gist* of this action; and then, *thirdly*, I shall consider *Southcote's Case*.

1. Those authorities in the Register, 110 a, b, of the pipe of wine, and the cure of the horse, are in point; and there can be no answer given them, but that they are writs which are framed short. But a writ upon the case must mention everything that is material in the case; and nothing is to be added to it in the count, but the time and such other circumstances. But even that objection is answered by Rast. Entr. 13 c, where there is a declaration so general. The year-books are full in this point: 43 Edw. 3, 33a, there is no particular act showed; there indeed the weight is laid more upon the neglect than the contract. But in 48 Edw. 3, 6, and 19 Hen. 6, 49, there the action is held to lie upon the undertaking, and that, without that, it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 Hen. 7, 11, 7 Hen 4, 14, these cases are all in point, and the action adjudged to lie upon the undertaking.

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2. Now to give reason of these cases, the *gist* of these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, etc.[1] So it is, 1 Jones, 179, Palm. 548; for the bailee is not bound upon any undertaking against the act of God. Justice Jones, in that case, puts the case of the 22 Ass., where the ferryman overladed the boat. That is no authority, I confess, in that case; for the action there is founded upon the ferryman's act, *viz.*, the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrong-doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods; which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he had taken into his custody upon such an undertaking. An action, indeed, will not lie for not doing the thing, for want of a sufficient consideration: but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods which, without such a warranty, I would not have done. And a man may warrant a thing without any consideration. And therefore, when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the

[1] See the observations of the Court in *Taylor* v. *Caldwell*, 3 B. & S., 826.

Countess of Salop.[1] An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that, in consideration the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking.[2] But there the action was laid generally.

3. *Southcote's Case*[3] is a strong authority; and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events: that is hard. Coke reports the case upon that reason; but makes a difference where a man undertakes, especially, to keep goods as he will keep his own. Let us consider the reason of the case; for nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Edw. 4, 40b, there is such an opinion by Danby. The case in 3 Hen. 7, 4, was of a special bailment, so that that case cannot go very far in the matter. 6 Hen. 7, 12, there is such an opinion, by the by. And this is all the foundation of *Southcote's Case*.[3] But there are cases there cited which are stronger against it, as 10 Hen. 7, 26; 29 Ass. 28, the case of a pawn. My Lord Coke would distinguish that case of a pawn from a bailment because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 Edw. 2, Fitzh. Detinue, 59.[4] The case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers do not know that difference; or, however, it may be with them, half mankind never heard of it. So, for these reasons, I think

[1] The Countess of Shrewsbury's Case, 5 Rep., 13b.

[2] See Com. 627; Burr. 1638.

[3] That notion in *Southcote's Case*, 4 Rep., 83b, that a general bailment, and a bailment to be safely kept, is all one, was denied to be law by the whole Court *ex, relatione m'ri Bunbury*.

[4] *Bonion's Case*, See Jones, 37.

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a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if [1] a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

Holt, C. J.—The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely; and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour, so that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case; and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And [2] there are six sorts of bailments. The first sort [3] of bailment is a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a "*depositum*, and it is that sort of bailment which is mentioned in *Southcote's Case*. The second sort is, when goods or chattels that are useful are lent to a friend *gratis*, to be used by him; and this is called *commodatum*,[4] because the thing is to be restored in *specie*. The third is when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to

[1] See Jones, 44.
[2] See Jones, 35.
[3] Just. Inst. lib. 3, tit. 14, text 3.
[4] *Ibid*, text 2.

him for money borrowed of him by the bailor; and this is called in Latin, *vadium*, and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them, for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them, *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

1. *Depositum.*—As to the[1] first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. *He is not answerable if they are stolen without any fault in him, neither will a common neglect* make him chargeable, but he *must be guilty of some gross neglect*. There is, I confess, a great authority against me; where it is held that a general delivery will charge the baliee to answer for the goods if they are stolen, unless the goods are specially accepted to keep them only as you will keep your own. But[2] my Lord Coke has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason or justice, in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him.[3] For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine to show an undisturbed rule and

[1] See Jones, 36.

[2] See 1 L. Ray. 655; Jones, 41.

[3] See Jones, 46, 62.

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practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter; and by them show, that there never was any such resolution given before *Southcote's Case*. The 29 Ass. 28 is the first case in the books upon that learning; and there the opinion is, that the bailee is not chargeable, if the goods are stolen. As for 8 Edw. 2, Fitzh. Detinue, 59; where goods are locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, it was held that the bailee should not answer for the goods; that case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest: for the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4, 40b, was but a debate at bar; for Danby was but a counsel then. Though he had been Chief Justice in the beginning of Edw. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's "Chronica Series." So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genny, for his client, said the contrary. The case in 3 Hen. 7, 4, is but a sudden opinion; and that by half the Court; and yet, that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read *Southcote's Case* [1] heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first; and came not to be of this opinion till I had well considered and digested that matter. Though I must confess, reason is strong against the case, to charge a man for doing such a friendly act for his friend; but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For

[1] 4 Rep., 83 b.

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if he[1] keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty. *A fortiori*, he shall not be charged where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3, c. 2, 99b: '*Is apud quem res deponitur, re obligatur, et de eâ re, quam accepit, restituendâ tenetur, et etiam ad id, si quid in re depositâ dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiæ vel negligentiæ, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et proprioe fatuitati hoc debet imputare.*' As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow.[2] So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author; but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 14. There the law goes further; for there it is said: "*Ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidiæ ac negligentiæ, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati, id imputare debet.*" So that such a bailee is not chargeable without an apparent gross neglect. And if there is such a *gross neglect*, it is looked upon as an *evidence of fraud*. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words; yet even that would not charge him with all sorts of neglects; for if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong-doers. 3 Cro. 214, acc., 2 Cro. 425, acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong-doers when put in

[1] Vinnius (by Heineccius, 1726), p. 605.

[2] But *see Doorman v. Jenkins*, 2 A. & E., 256, 1 Sm. L. C., 183, *in note*.

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writing, it is hard it should do it more so, when spoken, Doct. and Stud. 130 is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's Case*.[1] If the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect.

2. *Commodatum*.—As to the second sort of bailment, *viz.*, *Commodatum*, or lending *gratis* the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them; so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton *ubi supra*: his words are[2]: "*Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua interveuerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio, amiserit, non est dubium quin ad rei restitutionem teneatur.*" I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary.

[1] 4 Rep., 836.

[2] This is cited from Bracton, lib. 3, c. 2, 99, but is in effect the text of Just. Inst. Lib. 3. tit. 14, text 2.

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But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse he will be chargeable; because the neglect gave the thieves occasion to steal the horse. Bracton says, the bailee must use the utmost care; but yet he shall not be chargeable, where there is such a force as he cannot resist.

3. *Locatio rei.*—As to the third sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must recur to my old author, fol. 62 b[1]: "*Qui pro usu vestimentorum, auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem*[2] *diligentissimus pater familias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec propriis sufficit aliquem talem diligentiam adhibere, qualem suis rebus adhiberit, nisi talem adhibuerit, de quâ superius dictum est.*" From whence it appears that, if goods are let out for a reward, the hirer is bound to the[3] utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent so ever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man,[4] the bailee shall not be answerable in this case, if the goods are stolen.

4. *Vadium.*—As to the fourth sort of bailment, *viz.*, *vadium*, or a pawn, in this I shall consider two things; *first*, what property the pawnee has in the pawn or pledge; and *secondly*, for what neglects he shall make satisfaction. As to the first, he has a special property, for[5] the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor or to pay him. But if the pawn be such as it will be

[1] Just. Inst. lib. 3, tit. 24, text 5.

[2] See Jones, 87; and 1 Sm. L. C. p. 191.

[3] Comm. Vinn. in Just. Inst. lib. 3, tit. 25, text 5, n. 2, 3. See 1 Sm. L. C. pp. 190, 191.

[4] Lord Raym. 1087.

[5] S. P., 3 Salk. 268. Holt, 528. Salk. 522.

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the worse for using, the[1] pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she[2] might use them. But then she must do it at her peril; for whereas if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then[3] the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompence for the meat. As to the second point, Bracton, 99b, gives you the answer: *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam, adhibere, quam si, prestiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere.*[4] In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient if the pawnee use true diligence, and he will be indemnified in so doing, and, notwithstanding the loss yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and *Southcote's Case* is. But, indeed, the reason given in *Southcote's Case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender

[1] S. P., 3 Salk. 268, Holt, 528, Salk, 522

[2] *Ibid*, See Jones, 80,81.

[3] *Ibid*. See Jones, 80,81. Distress, being a sort of pledge, may not be used; *Smith* v. *Wright*, 6 H. & N. 821,826.

[4] This is also the effect of Just. Inst. lib. 3, tit. 14, text 4, *De pignore*.

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of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

5. *Locatio operis faciendi.*—As to the fifth sort of bailment, *viz.*, a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to *one that exercises a public employment*, or a delivery to *a private person*. First, if it be to a *person of the first* sort, and he is to have a *reward, he is bound to answer for the goods at all events*. And this is the case of the common carrier, common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged, 26 Car. 2, in the case of *Mors.* v. *Slue*, Sir T. Raym. 220, 1 Vent. 190, 238. The law charges this person, thus entrusted, to carry goods against all events but acts of God; and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law,[1] for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with theives, &c., and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailees, factors, and such like. And though a bailee is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and kept it locked up with reasonable care, he shall not be answereable for it, though it be stolen. But yet

[1] Just. Inst. lib. 4, tit 5, text 3. See Vinn. Comm. in Just. Inst. lib. 3, tit. 2, text 11, n. 2.

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this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, further than the nature of the thing puts it in his power to perform it.[1] But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

6. *Mandatum.*—As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor which is the case in question, what will you call this? In Bracton, lib. 3,100, it is called *Mandatum.* It is an obligation which arises *ex mandato.* It is what we call in English an acting by commission. And if a man acts by commission for another *gratis,* and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his commentaries upon Justinian, lib. 3, tit. 27, 684[2] defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur.* This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra,* says, '*contrahitur etiam obligatio, non solum scripto et verbis sed et consensu sicut in contractibus bonæ fidei, ut in emptionibus, venditionibus, locationibus conductionibus societatibus et mandatis.*' I do not find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority. The reasons are, *first,* because in such a case a neglect is a deceit to the bailor. For when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuation that induced the plaintiff

[1] See *per* Bowen, L. J., The Moorcock, 14 P. D. p. 70.

[2] This is the same as lib. 3, tit 26, of modern editions of the Justitutes.

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to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action; 1 Roll. Abr. 10; 2 Hen. 7, 11; a strong case to this matter. There the case was an action against a man who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And the reason of the judgment is given, because, "when the party has taken upon him to keep the sheep, and after suffers them to perish in his default, inasmuch as he has taken and executed his bargain, and has them in his custody, and, after, he does not look to them, an action lies; for here is his own act, *viz.*, his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action?

But, *secondly*, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the *owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management*. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the [1] defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but, in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man[2] will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. The 19 Hen. 6, 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4, 33, this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the Court—what if he had built the house unskilfully?—and it is agreed in that case an action would have lain. There has been a question made: If I deliver goods to A, and in consideration thereof he promise to re-deliver them, if an action will lie for

[1] See Jones, 56, 57, 61.

[2] Just. Inst. lib 3, tit. 26, text 11.

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not re-delivering them ; and, in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed ; and according to that, reversal, there was judgment afterwards entered for the defendant in the like case ; Yelv. 128. But those cases were grumbled at ; and the reversal of that judgment in Yelv. 4 was said by the judges to be a bad resolution ; and the contrary to that reversal was afterwards most solemnly adjudged, in 2 Cro. 667, Tr. 21 Jac. 1 [1], in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon a trust, and take the goods into his possession. The declaration in the case of *Mors* v. *Slue* [2], was drawn by the greatest drawer in England in that time ; and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original, I have said thus much in this case, because it is of great consequence that the law should be settled in this point ; but I do not know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle.

And judgment was given for the plaintiff.

NOTE.

This case lays down the principle that if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, though he may not be liable if he neglects to perform it ; in other words, the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. It follows therefore that if a man undertake to carry goods safely, he is responsible for damage sustained by them in the carriage through his neglect, though he is not a common carrier and was to have nothing for the carriage. A distinction, however, is observed between actual insurance of the safety of the goods and a

[1] *Wheatley* v. *Low*, Cro. Jac. 668.

[2] Sir T. Raym. 220 ; 1 Vent. 190, 238.

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contract to take resonable care for their safety ; the latter does not involve an absolute obligations to carry safely. See *East Indian Ry.* v *Kalidas Mukerji*, L. R. 28 I. A . 144.

The liability of a common carrier is of course wider ; he exercises a public employment to receive goods to be transported from place to place for a reasonable reward, and speaking generally he is responsible for the safe carriage at all events, but the act of God or the King's enemies. On the other hand, the obligation to carry with due care as distinguished from the obligation of a common carrier to carry safely, may be incurred by one who is not a common carrier, and arises upon the actual reception of the goods for carriage, although the service is to be performed without reward. See *Mors* v. *Slue*, 1 Ventris, 190, 238 ; 86 Eng. Rep. 129, 159 ; 84 Eng. Rep. 601 ; 83 Eng. Rep. 115, 453.

See Sec. 151 of the Indian Contract Act.

JAMES CUNDY

v.

THOMAS LINDSAY.

[*Reported in L. R., 3 Ap. Cas., 459.*]

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March, 4.

THE LORD CHANCELLOR (LORD CAIRNS).—My Lords, you have in this case to discharge duty which is always a disagreeable one for any Court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequence of a fraud practised upon both of them must fall. My Lords, in discharging that duty your Lordships can do no more than apply, rigorously, the settled and well known rules of law. Now, with regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the puchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

My Lords, the question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple

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one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the meantime, Blenkarn might have conveyed a good title for valuable consideration to the present appellants.

Now, my Lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done, the whole history of the whole transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally—everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my Lords, discharging that duty and answering that inquiry, what the jurors have found is in substance this: it is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents; that by all those means he led, and intended to lead, the respondents to believe and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well known and solvent house of Blenkiron & Co., doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn —the dishonest man, as I call him—was acting here just in the

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same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself but, the firm of Blenkiron & Co. Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case namely in which the contract never comes into existence. My Lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which was attempted to be given to the appellants was a title which could not be given to them.

My Lords, I therefore move your Lordships that this appeal be dismissed with costs, and the judgment of the Court of Appeal affirmed.

Lord Hatherley.—My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. The real question we have to consider here, is this whether or not any contract was actually

entered into between the respondents and a person named Alfred Blenkarn, who imposed upon them in the manner described in the verdict of the jury; the case that was tried being one as between the alleged vendors and a person who had purchased from Alfred Blenkarn.

Now the case is simply this, as put by the learned Judge in the Court below; it was most carefully stated, as one might expect it would be by that learned Judge: "Is it made out to your satisfaction that Alfred Blenkarn, with a fraudulent intent to induce customers generally, and Mr. Thomson in particular, to give him the credit of the good character which belonged to William Blenkiron & Sons, wrote those letters in the way you have heard, and had those invoices headed as you have heard," and further than that, "did he actually by that fraud induce Mr. Thomson to send the goods" "to 37, Wood Street?"

Both these questions were answered in the affirmative by the jury. What, then, was the result? It was, that there were letters written by a man endeavouring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of Blenkiron & Co., Wood Street. That was done by a falsification of the signature of the Blenkirons, writing his own name in such a manner as that it appeared to represent the signature of that firm. And further, his letters and invoices were headed "Wood Street," which was not an accurate way of heading them; for he occupied only a room on a third floor, looking into Little Love Lane on one side, and looking into Wood Street on the other. He headed them in that way, in order that by these two devices he might represent himself to the respondents as Blenkiron of Wood Street. He did that purposely; and it is found that he induced the respondents by that device to send the goods to Blenkiron of Wood Street. I apprehend, therefore, that if there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the Blenkirons of Wood Street, if they had chosen to adopt it, and to no other person whatever—not to this Alfred Blenkarn, with whom the respondents had not, and with whom they did not wish to have, any dealings whatever.

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My Lords, it appears to me that that brings the case completely within the authority of *Hardman* v. *Booth*,[1] where it was held that there was no real contract between the parties by whom the goods were delivered and the concoctor of the fraud who obtained possession of them, because they were not *to him* sold. Exactly in the same here, there was no real contract whatever with Alfred Blenkarn; no goods had been delivered to any body except for the purpose of transferring the property to Blenkiron (not Blenkarn); therefore the case really in substance is the identical case of *Hardman* v. *Booth* [1] over again.

My noble and learned friend who sits opposite to me (Lord Penzance) has called my attention to a case which seems to have been decided on exactly the same principle as *Hardman* v. *Booth*,[1] and it is worth while referring to it as an additional authority upon that principle of law. It is the case of *Higgons* v. *Burton*.[2] There, one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in the action, was dismissed by his employers; he concealed that dismissal from a customer of the firm, the plaintiff in the action, and, having concealed that dismissal, continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent; but he had been dismissed from the agency—there was no contract, therefore, with the firm; there was no contract, ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm; and the consequence was that there was no contract at all. There, as here, the circumstance occurred that an innocent person purchasing the goods from the person with whom there was no contract was obliged to submit to his loss. The point of the case is put so very shortly by Chief Baron Pollock, that I cannot do better than adopt his reasoning: "There was no sale at all, but a mere obtaining of goods by false pretences; the property, therefore, did not pass out of the plaintiffs." The other Judges, who were Barons, Martin, Bramwell, and Watson, concurred in that judgment.

[1] 1 H. & C., 803 [2] 26 L. J. (Ex.), 342.

Here, I say, exactly as in those cases of *Hardman* v. *Booth*,[1] and *Higgons* v. *Burton*,[2] there was no sale at all; there was a representation, a false representation, made by Blenkarn, by which he got goods sent to him, upon applications from him to become a purchaser, but upon invoices made out to the firm of Blenkiron & Co. But no contract was made with Blenkarn, nor any contract was made with Blenkiron & Co., because they knew nothing at all about it, and therefore there could be no delivery of the goods with the intent to pass the property.

We have been pressed very much with an ingenious mode of putting the case on the part of the counsel who have argued with eminent ability for the appellants in this case, namely, suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented that he was a member of one of the largest firms in London. Suppose on his making that representation the goods had been delivered to him. Now I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm, or suppose he had said: "I am as rich as that firm. I have transactions as large as those of that firm. I have a large balance at my bankers"; then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations; and the parting with the goods in that case might possibly—I say no more—have passed the property.

But this case is an entirely different one. The whole case, as represented here is this; from beginning to end the respondents believed they were dealing with Blenkiron & Co., they made out their invoices to Blenkiron & Co., they supposed they sold to Blenkiron & Co., they never sold in any way to Alfred Blenkarn; and therefore Alfred Blenkarn cannot, by so obtaining the goods, have by possibility made a good title to a purchaser, as against the owners of the goods, who had never in any shape or way parted with the property, nor with anything more than the possession of it.

[1] 1 H & C., 803.
[2] 26 L. J. (Ex.), 342.

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LORD PENZANCE.—My Lords, the findings of the jury in this case, coupled with the evidence, warrant your Lordships in concluding that the following are the circumstances under which the respondents parted with their goods. Whether by so doing they passed the property in them to Alfred Blenkarn is I conceive the real question to be determined.

The respondents had never seen or even heard of Alfred Blenkarn, when they received a letter followed by several others signed in a manner which was not absolutely clear, but which the writer intended them to take, and which they did take, to be the signature of a well-known house of Blenkiron & Co., which in fact carried on business at No. 123, Wood Street. The purport of these letters was to order the goods now in question. The house of Blenkiron & Co. was known to the respondents, and it was also known that they lived in Wood Street, though the respondents did not know the number. The respondents answered these letters, addressing their answers to Blenkiron & Co. in Wood Street, but in place of No. 123, they directed them to No. 37, which was the number given in the letters as the address of that firm. In the result they sent of the goods now in dispute, and addressed them, as they had addressed their letters, to Blenkiron & Co., No. 37, Wood Street, London. It is not doubted or disputed that throughout this correspondence and up to, and after, the time that the respondents had despatched their goods to London, they intended to deal and believed they were dealing with Blenkiron & Co., and with no body else; nor is it capable of dispute that, when they parted with the possession of their goods, they did so with the intention that the goods should pass into the hands of Blenkiron & Co., to whom they addressed these goods. The goods, however, were not delivered to Blenkiron & Co., to whom they were addressed, but found their way to the hands of Alfred Blenkarn, owing to the number in Wood Street being given as No. 37, in place of No. 123—a mistake which had been purposely brought about by the writer of the letters as I have before mentioned, who was no other than Alfred Blenkarn, and who had an office or room at No. 37, Wood Street.

In this state of things, it is not denied that the contract, or dealing, which the respondents thought they were entering into with Blenkiron & Co., and in fulfilment of which they parted

with their goods, and forwarded them to what they thought was the address of that firm, was no contract at all with them, seeing that Blenkiron & Co., knew nothing of the transaction. But, say the appellants, it was a contract with, and a good delivery to, Alfred Blenkarn so as to pass the property in the goods to that individual, although the goods were not addressed to him and the respondents did not know of his existence.

I am not aware, my Lords, that there is any decided case in which a sale and delivery intended to be made to one man, has been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. And if this cannot be, it is difficult to see how the contention of the appellants can be maintained. It was indeed argued that as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought at least to be shown that the respondents knew that there was such a person, and that he had offices there—whereas the contrary is the fact, and the respondents only adopted the number because it was given as the address in letters purporting to be signed "Blenkiron & Co."

My Lords, I am unable to distinguish this case in principle from that of *Hardman* v. *Booth*,[1] to which reference has been made. In that case Edward Gandell, who obtained possession of the plaintiff's goods, pretended to have authority to order goods for Thomas Gandell & Co., which he had not, and then intercepted the goods and made away with them; the Court held that there was no contract with Thomas Gandell & Co., as they had given no authority, and none with Edward Gandell, who had ordered the goods, as the plaintiffs never intended to deal with him.

In the present case Alfred Blenkarn pretended that he was, and acted as if he was, Blenkiron & Co., with whom alone the vendors meant to deal. No contract was ever intended with him, and the contract which was intended failed for want of another party to it. In principle the two cases seem to me to be quite alike.

[1] 1 H. & C., 803.

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Another case of a similar kind is that of *Higgons* v. *Burton* [1] to which similar reasoning was applied.

Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be some one else of credit and stability, and under this belief to have actually delivered goods into his hands. My Lords, I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can I think be parallel with that which your Lordships have now to decide. For in the present case the respondents were never brought personally into contract with Alfred Blenkarn; all their letters, although received and answered by him, were addressed to Blenkiron & Co., and intended for that firm only; and finally the goods in dispute were not delivered to him at all, but were sent to Blenkiron & Co., though at a wrong address.

This appeal, ought therefore, in my opinion, to be dismissed.

Lord Gordon—Concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

NOTE.

This case illustrates how a transaction may not ripen into a contract by reason of an error as to the person with whom one is contracting, provided of course that it is material for the one party to know who the other is. In other words, if the intention of a contracting party is to create an obligation between himself and another certain person, and if that intention fails to take its proper effect, it cannot be allowed to take the different effect of involving him without his consent in a contract with some one else. Thus if C who is a man of no means obtains goods from A by writing for them in the name of B, a solvent merchant already known to A, or one only colourably differing from it, there is not a voidable contract between A and C, but no contract at all; no property passes to C and he can transfer none even to an innocent purchaser, save perhaps in market overt. The pretended sale fails for want of a real buyer. See Secs. 13 and 108 of the Indian Contract Act.

[1] 26 L. J. (Ex.), 342.

DHANIPAL DAS

v.

RAJA MANESHAR BAKHSH SINGH.[1]

[Reported in L. R., 33 I. A., 118; I. L. R., 28 All., 520; 4 C. L. J., 1.]

1906. *May, 10.*

The judgment of their Lordships was delivered by

Lord Davey.—The original plaintiff Auseri Lal was the head of a joint Hindu family. He is now deceased, and the present appellants, as the surviving members of the family, have been substituted for him on the record. Auseri Lal, on behalf of the family, formerly carried on the business of a banker and money-lender in the district of Sitapur in Oudh; and in the course of his business he had, previously to the transactions which are the subject of this appeal, lent money to the respondent, who was and is the *talukdar* of Mallanpur, in the same district.

In the year 1886 the respondent, being then largely involved in debt, was, on his own application, declared by the Chief Commissioner of Oudh a disqualified proprietor under the provisions of the Oudh Land Revenue Act, 1876, and his property was placed under the charge of the Court of Wards on August 12 in that year. The respondent's property remained under such charge until some time in the month of July, 1898, when it was re-leased to him, and he resumed possession. While the estate was under its charge the Court of Wards made an allowance of Rs. 1,250 *per mensem* to the respondent for the maintenance of himself and his family.

On February 4, 1889, the respondent, without the sanction of the Court of Wards, borrowed from Auseri Lal the sum of Rs. 4,500, and executed in his favour a bond which was duly registered for that amount stipulating that he would repay the amount in two years, with interest at the rate of Rs. 2 *per mensem*, payable half-yearly out of his allowance of Rs. 1,250 *per mensem*, and stipulating further that in case default was made in the payment of interest he would pay compound interest

[1] *Present*: Lord Davey, Lord Robertson, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

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at the same rate until the amount secured by the bond was fully paid off and satisfied. The respondent did not pay any sum either for principal or interest due on this bond, and after it had become due negotiations were apparently opened by his officers on his behalf with the plaintiff for a further advance at a lower rate of interest. In the result an account was settled between the respondent and Auseri Lal of the amount due on the bond for Rs. 4,500, and it was found that that sum, with interest and compound interest at the rate of 2 per cent. *per mensem* up to January 13, 1892, came up to Rs. 8,750. On the last mentioned date Auseri Lal advanced to the respondent the further sum of Rs. 1,250, and the latter without the sanction of the Court of Wards executed in favour of the former a bond, also registered, for the total sum of Rs. 10,000, stipulating that he would repay the amount in seven years, with interest at the rate of Re. 1-8 per cent. *per mensem* payable half-yearly, and stipulating further that in default of payment of interest on due dates he would pay compound interest at the same rate, and that he would pay interest and compound interest on the amount secured by the bond until it was fully paid off and satisfied.

The present suit was brought on the bond of January 13, 1892. The defence is, *first*, that the respondent, being at the date of the bond a disqualified proprietor, had no power under the Act to borrow money without the sanction of the Court of Wards; and, *secondly*, that the bargain was an unconscionable one, and procured by the exercise of undue influence within the meaning of s. 16 of the Indian Contract Act, 1872, as amended by s. 2 of Act VI of 1899.

The first point depends on the construction and effect of the group of sections (161 to 177) in the Oudh Land Revenue Act, 1876, intituled "Chapter VIII Court of Wards." Sect. 162 defines the persons who shall be held to be disqualified to manage their own estates, including (*g*) persons declared by the Chief Commissioner on their own application to be disqualified. By s. 166 the jurisdiction of the Court of Wards extends to the care and education, and to the management of the property, of the persons subject thereto. By s. 167 the Court of Wards may appoint managers of the property of disqualified proprietors, and if such proprietors be minors, idiots, or lunatics,

may appoint guardians for the care of their persons. By s. 170 the manager appointed by the Court of Wards may collect the rents of the land entrusted to him as well as all other money due to the disqualified proprietor and may, subject to the control of the Court, grant or renew leases of a limited duration. The more important sections are 173 and 174.

"173. Persons whose property is under the superintendence of the Court of Wards, shall not be competent to create without the sanction of the Court any charge upon or interest in such property or any part thereof."

"174. No such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any such person while his property is under such superintendence."

From a perusal of the group of sections above referred to their Lordships are of opinion that it was not intended to interfere with the personal *status* or rights of an adult disqualified proprietor who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited. There is no prohibition of a disqualified proprietor contracting debts or borrowing money, and it is contemplated in s. 174 that such a person may enter into contracts which, but for the provisions of that section, might result in his property being taken in execution. But the disqualified proprietor may not without the sanction of the Court create any charge upon his property. It was argued, however, that to allow a disqualified proprietor to contract debt would enable him by anticipation to waste the estate when restored to his care, and so defeat the objects of the Act, and would therefore be inconsistent with the other provisions and purposes of the Act. This argument would have been a cogent one for the consideration of the Legislature in framing the Act. But their Lordships think that there is no necessary implication of a prohibition to contract personal obligations, and they are not entitled to read into the Act a curtailment of the proprietor's personal rights which they do not find there.

Their Lordships were referred to the case of *Mohummud Zahoor Ali Khan* v. *Mussamat Thakoorani Rutta Koer*,[1] in which

[1] 11 Moo. I. A., 468.

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it was said that Sir James Colvile, delivering the judgment of this Board, had assumed that a disqualified landowner whose estate had been placed under a manager by the Court of Wards under Bengal Regulation LII of 1803 was incapacitated from contracting debts, as had in fact been decided by the Sudder Dewanny Court at Agra. It was not, however, necessary to consider the point, as their Lordships held that the necessary formalities had not been complied with for making the person in question a disqualified proprietor, and gave judgment for the amount due on the bond. There was therefore no decision on the point. In the case of *Rai Balkrishna* v. *Mussamat Masuma Bibi*,[1] the language of the marginal note is misleading, for the only question was whether the proprietor was competent to convey the property by mortgage or sale while the estate was under the management of the Court of Wards, and nothing was decided or said on the question now under consideration. Their Lordships agree with the decision come to by both Courts below that the respondent was not incompetent to execute the bond in suit.

On the other point the learned counsel for the respondent admitted that the case rested entirely on the question whether the interest charged in the two bonds was reasonable. The Subordinate Judge held that the rate of interest was high in this sense, that compound interest was charged. Simple interest at Re. 1-8 per cent. *per mensem* he thought would not have been high. He held that the amended s. 16 of the Indian Contract Act did not apply to the case, but on a mistaken view of certain English authorities he was of opinion that wherever a transaction or contract appears to a Court of Equity to be a "hard bargain" it cannot be enforced in its "entirety"; and, holding that this was a "hard bargain," he said: "I do not mean that the present is a case of actual fraud or undue influence, but it is certainly a case of inequitable dealing." In the result he decreed the claim for Rs. 10,000 principal and simple interest at 18 per cent. *per annum*.

In the Court of the Judicial Commissioner it was held that there was a presumption that there had been on the part of the then plaintiff an unconscientious use of power arising from the

[1] L. R., 9 I. A., 182.

circumstances and conditions of the contracting parties. In other words, the respondent's consent to the transactions was caused by undue influence within the meaning of the amended s. 16 of the Indian Contract Act, and the transaction was therefore voidable. Accordingly the Court gave the plaintiff a decree for Rs. 4,500 (the principal money under the first bond), with interest at 6 per cent. a year from February 4, 1889, and Rs. 1,250 (the additional advance on the second bond), with interest at the same rate from January 13, 1892.

Auseri Lal himself was advanced in years at the respective dates of the two bonds in suit, and states that his nephew Madho Ram, one of the present appellants, looked after his affairs. Madho Ram's evidence was extremely unsatisfactory. He professed not to remember what took place when the bonds were executed, and not to know what was the Court of Wards or what the word "Court" meant. This evidence does not assist the appellants' case in any way. The only other evidence contained in the record is that of the respondent himself. He states that his allowance from the Court of Wards was not sufficient to enable him to pay the interest on the bonds, and the only property from which he could satisfy his debt was the jewellery belonging to the females of his family, the value of which, however, he did not know. He further stated that this jewellery had been pledged to Auseri Lal some seven or eight years ago, though whether before or after the deed of 1892 he could not say, and that it had not been redeemed. He stated that no fraud or undue influence was practised upon him on taking the deed of 1889 or that of 1892.

The fair result of this evidence is that the respondent, through his improvidence, was in urgent need of money, and owing to his estate being under the care of the Court of Wards he was in a helpless position. There was no fraud in the matter and no pressure was put upon the respondent by Auseri Lal or his agents to induce him to accept the conditions offered to him; and indeed the fact of interest being reduced on the second transaction from 24 per cent. to 18 per cent. points to some negotiations having taken place between them. But it must be taken that the respondent was compelled by his circumstances to accept the terms which were offered to him both in 1889 and 1892.

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Their Lordships are of opinion that although the respondent was left free to contract debt, yet he was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards, and they must assume that Auseri Lal, who had known the respondent for some fifty years, was aware of it. They are therefore of opinion that the position of the parties was such that Auseri Lal was "in a position to dominate the will" of the respondent within the meaning of the amended s. 16 of the Indian Contract Act. It remains to be seen whether Auseri Lal used that position to obtain an unfair advantage over the respondent.

The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended s. 16 only. He also mistook the English law. Apart from a recent statute an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud, which is not this case. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case. But, although he was wrong in the reasons for his judgment, the Subordinate Judge may be right in his findings of fact. He finds that simple interest at Re. 1-8 per cent. *per mensem* (18 per cent. *per annum*) would not have been high, and their Lordships do not find that the Court of the Judicial Commissioner expressed any dissent from this finding. On the other hand, their Lordships think that the Subordinate Judge must be taken to have found that the charging of compound interest in the circumstances was unconscionable, and they understand the Court of the Judicial Commissioner also to have so found. Their Lordships are not disposed to differ from a concurrent finding of the Courts below, even if it be not strictly a finding of fact. The result is that their Lordships must hold that the lender used his position to demand and obtain from the respondent more onerous terms than were reasonable, and the bond sued on must be set aside. Their Lordships, however, think that in the particular circumstances of the present case justice will be met by allowing the appellants simple interest at 18 per cent. *per annum* on the sums advanced by Auseri Lal throughout.

Their Lordships agree with the Court of the Judicial Commissioner that the letters written by the respondent or his agent, which were referred to by Mr. Bonnerjee, do not amount to a ratification of the transaction.

Their Lordships will, therefore, humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of Oudh, dated June 3, 1902 (except so far as it directs that the bond sued on be set aside, and that the costs of the original suit be paid by the defendant to the plaintiff), be varied, and as varied stand as follows (that is to say), that it be ordered that the respondent pay to the appellants the sum of Rs. 4,500, with simple interest at the rate of 18 per cent. a year from February 4, 1889, to the date of payment, and the sum of Rs. 1,250, with simple interest at the same rate from January 13, 1892, to the date of payment, with proportionate costs on the amount decreed to be settled by the Judicial Commissioner in case of difference, and that as to the rest each party bear his own costs. There will be no costs of this appeal.

NOTE.

Act VI of 1899 which came into force on the 1st May 1899 and applies to every contract in respect of which any suit is instituted or which is put in issue in any suit after the commencement of that Act substantially altered and enlarged the scope of the definition of undue influence contained in the Indian Contract Act. The terms of the original section were not large enough to cover all the cases in which the Courts were called upon to afford relief. The section provided for only two classes of cases, which are now given merely as illustrations of the general principle according to which undue influence is imputed to any person, who, being in a position to exercise dominion over another, obtains from him an unfair advantage. The new section also provides that the burden of disproving undue influence is upon the person against whom it is established that he was in a position to exercise dominion and that the transaction is unconscionable. Of course the question whether one person is in a position to dominate the will of another must be determined with reference to the circumstances of each case. Thus in *Sunder Koer* v. *Sham Kissen*, I. L. R., 34 Calc. 150 P. C., 5 C. L. J. 106, the Privy Council held that urgent need on the part of a borrower does not of itself constitute a circumstance from which an inference of undue influence can be legitimately drawn, as a creditor cannot be said to be placed in a position to dominate the will of his debtor simply because the latter is in urgent need of money.

Reference may be made to the cases of *Aylesford* v. *Morris*, L. R., 8 Ch. App. 484 and *O'Rorke* v. *Bollingbroke*, 2 App. Cas. 823; *Ram Coomar* v. *Chundercant*, L. R., 4 I. A. 23, see *ante*; *Ramlal* v. *Nilkanth*, L. R. 20

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I. A. 112; *Mokham Singh* v. *Rup Singh*, L. R. 20 I. A. 127; *Kamini* v. *Kali Prasanna*, L. R. 12 I. A. 215; which are illustrations of cases between money-lenders and improvident borrowers.

Reference may also be made to *Buzloor Shamsunnissa*, 11 Moo. I. A. 551; *Sudhish Lal* v. *Sheobarat*, I. L. R. 7 Calc. 245; *Amarnath* v. *Achan Kumar*, L. R. 19 I. A. 196; *Wajid Khan* v. *Ewaz Ali*, L. R. 18 I. A. 144; *Mahomed* v. *Hossaini*, L. R. 15 I. A. 81; which are illustrations of cases of dealings with *purdanashin women*.

CANADIAN PACIFIC RAILWAY COMPANY

v.

ROY.[1]

[*Reported in* (1902) *A. C.*, 220.]

1901
December, 18.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR.—This is an appeal by the Canadian Pacific Railway Company against a judgment of the Court of Queen's Bench for Lower Canada, affirming a judgment of the Superior Court of Quebec, whereby that company were held to be liable to damages to the extent of $300 for injuries to the plaintiff's property alleged to be caused, and now admitted to have been caused, by sparks escaping from one of their locomotive engines while employed in the ordinary use of its railway.

Some questions were raised in the Courts below, and to some extent referred to here, whether the judgment could be supported upon the ground of the appellants having been guilty of negligence in their management of the engine or its appliances being defective. No such question is now before their Lordships. By arrangement that question has been withdrawn, and their Lordships are not to be taken as giving any opinion whether there was any evidence of negligence, or, if there was, how that issue ought to be determined.

The serious and important questions, ought to be raised in this appeal, is whether the railway company, authorised by statute to carry on their railway undertaking in the place and by the means that they do carry it on, are responsible in damages for injury not caused by negligence, but by the ordinary and normal use of their railway.

Both Courts below have held that in the province of Quebec the railway company is so responsible, and the question is whether that is the law.

The argument appears to be founded on the suggestion that Quebec has a civil law of its own, and that in that province all

[1] *Present* :—The Lord Chancellor, Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson, Lord Lindley and Sir Ford North.

1901

Canadian Pacific Railway Company v. Roy.

corporations like all other persons are responsible for causing damage to their neighbours by a fault—that is to say, any actionable wrong, whether imprudence or want of skill; and another article of the Code provides that civil corporations constituting by the fact of their incorporation ideal or artificial persons are as such governed by the laws affecting individuals, saving the privileges they enjoy and the disabilities they are subjected to.

If the immunity claimed for the appellants were simply claimed upon the ground that they were a corporation without reference to what they are authorised to do in that capacity, the argument would be well founded; but the fallacy of the suggestion lies in supposing that that immunity is claimed because they are a corporation. If it were so, there would be no difference between the law of England and the law as so expounded in the province of Quebec; but the ground upon which the immunity of a railway company for injury caused by the normal use of their line is based is that the Legislature, which is supreme, has authorised the particular thing so done in the place and by the means contemplated by the Legislature, and that cannot constitute an actionable wrong in England any more than it can constitute a fault by the Quebec Code. The principle has been lucidly expounded by Lord Hatherley in the case of *Geddis* v. *Proprietors of Bann Reservoir* [1] thus:—

"If a company, in the position of the defendants there,[2] has done nothing but that which the Act authorised—nay, may in a sense be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers.

"My Lords, I say the proper mode of executing those powers, because it appears to me that it is very neatly and appositely

[1] 3 App. Cas., 430, at p. 438.

[2] *Cracknell* v. *Corporation of Thetford*, L. R., 4 C. P., 629.

put by Mr. Baron Fitzgerald, in giving his judgment in the Court of Exchequer Chamber, in this form. Mr. Baron Fitzgerald says :—

"The substantial question raised on the pleadings in the first and second Courts of the declaration, appears to me to be whether these acts of the defendants were done in a due exercise of their authority, under the local and personal statute which has been mentioned, without negligence."

And Lord Cairns in the case of *Hammersmith Ry. Co.* v. *Brand* points out that it would be a repugnant and absurd piece of legislation to authorize by statute a thing to be done, and at the same time leave it to be restrained by injunction from doing the very thing which the Legislature has expressly permitted to be done.

Lord Cairns said :—"It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think, from the statements in this case that the railway could not be used for the purpose for which it was intended without vibration. It is clear to demonstration that the intention of Parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequences would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and had succeeded, the Court of Chancery would interfere by injunction, and would prevent the railway being worked—which, of course, is a *reductio ad absurdum*, and would defeat the intention of the Legislature. I have, therefore, no hesitation in arriving at the conclusion that no action would be maintainable against the railway company."

This permission, of course, does not authorize the thing to be done negligently or even unnecessarily to cause damage to others. Much was argued by the learned counsel for the respondent as to the peculiar jurisprudence of Quebec; but in truth

[1] L. R., 4 H. L., 171, at p. 215.

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there is no such difference between the law of England and the law of Quebec in this respect as he seemed to suppose. The law of England, equally with the law of the province in question, affirms the maxim "*Sic utere tuo ut alienum non laedas*," but the previous state of the law, whether in Quebec, or France, or England, cannot render inoperative the positive enactment of a statute, and the whole case turns, not upon what was the common law of either country, but what is the true construction of plain words authorizing the doing of the very thing complained of.

The Legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege as well as a right and duty, and it seems to their Lordships it comes within the express language of the Code (Art. 356).

But it is said that the Dominion Railway Act itself expressly maintains the liability of railway companies under provincial law for damages caused by their operation, and s. 92 is referred to. This may be disposed of in a sentence. That section refers to compensation under the Act, and not to damages in an action at all, which is what the question is here.

Sect. 288 is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway; but if one looks at the heading under which that section is placed, and the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant, and authorize in one part of the statute what it made an actionable wrong in another. It would reduce the legislation to an absurdity, and their Lordships are of opinion that it cannot be so construed.

Mr. Blake, for the appellants, having waived their right to recover damages or costs awarded in Canada to the respondent, their Lordships will humbly advise His Majesty that the judgment of the King's Bench, affirming the judgment of the Superior Court, ought to be reversed except as to costs. In the exercise of the discretion expressly reserved to their Lordships by the Order in Council granting leave to appeal, their Lordships direct the appellants to pay the respondent's costs of this appeal.

1901.

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NOTE.

This case lays down the principle that persons associated or incorporated for public purposes with statutory powers, are, in the absence of statutory provisions as to their liability, not responsible for accidents occurring through the use of their statutory powers in a manner necessary for carrying out the public purposes, provided they have taken every precaution and adopted every means in their power to prevent damage. In other words, statutory authority is also statutory indemnity taking away all legal remedies provided by the law of torts for persons injuriously affected. Reference may be made in addition to the decisions relied upon in the leading case, to the judgments in *Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 679. See also the decision of the Privy Council in *Eastern and S. A. Co.* v. *Cape Town Tramway Co.*, (1902) A. C. 381, and of the House of Lords in *Brighton Ry. Co.* v. *Truman*, 11 App. Cas. 45.

The rule laid down in the leading case has been followed in this country; see *Sankara* v. *Secretary of State*, I. L. R 28 Mad. 72.

THE GAEKWAR SARKAR OF BARODA

v.

GANDHI KACHRABHAI KASTURCHAND.[1]

[*Reported in I. L. R., 27 Bom., 344; L. R., 30 I. A., 60.*]

The judgment of their Lordships was delivered by

1903. February, 10.

Lord Macnaghten.—The respondent, who was plaintiff in the suit, is the owner of lands in the village of Kokta and its neighbourhood. He complained that since the making of the Mehsana-Viramgaum Railway his lands had been flooded in the rainy season. The Railway, which was constructed by the Gaekwar of Baroda, was finished in 1891. Ever since it has been under the control and management of the Bombay, Baroda and Central India Railway Company, by whom it is still worked. The respondent brought his suit against the Gaekwar with the consent of the Governor-General in Council, as required by section 433 of the Civil Procedure Code, and also against the Railway Company. His case was that the mischief of which he complained was occasioned by the negligent manner in which the works of the Railway had been constructed and maintained. He claimed damages and an injunction.

The Subordinate Judge of Ahmedabad and the High Court of Judicature at Bombay both found in favour of the respondent on the question of negligence, and concurred in awarding damages and an injunction, though the damages assessed by the Subordinate Judge were reduced in amount by the High Court. Both defendants appealed to His Majesty. But the Railway Company did not lodge a case or appear by counsel to support their appeal.

The concurrent finding of the two Courts was hardly disputed before this Board. The negligence proved appears to have been of a very gross character. Before the Railway was made the surface water of a district four miles distant from Kokta, which was abundant in the rainy season, used to pass away to the westward without coming near the respondent's lands. The

[1] *Present*—Lord Macnaghten, Lord Lindley, Sir Arthur Wilson, and Sir John Bonser.

Railway, which there runs north and south, was constructed on an embankment. The embankment was designed with so little skill that no proper provision was made for the passage of the surface water. The greater part of it, being obstructed by the embankment, flowed down by the east side of the line and drowned the respondent's lands. The mischief was increased by the fact that a series of excavations or burrow pits, as they are called, from which earth had been taken to form the embankment, were turned into a continuous channel by the action of the water washing away the barriers left between them. A similar thing happened on the other side of the Railway, and some of the water that did pass through the embankment ran down a channel formed on the western side of the line, and also found its way on to the respondent's lands.

The Railway was constructed under the Indian Railway Act, 1890, and is subject to the provisions of that Act.

The Act of 1890 provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the provisions of the Land Acquisition Act, 1870. It also provides that the Governor-General in Council is to determine in case of difference what accommodation works are required for the convenience of adjoining owners.

In these circumstances their Lordships were much surprised to hear the arguments addressed to them at the Bar. The leading counsel who appeared for the Gaekwar contended, first, that inasmch as the Act of 1890 authorized the undertakers to construct all necessary embankments, this embankment, as constructed, was an authorized work, and that the statutory authority conferred by the Act of 1890 (though in fact no statutory authority was required by the Gaekwar for the construction of an embankment on his own land) actually protected the Gaekwar from any claims connected with or arising out of negligent or defective construction. In the second place he contended that, although the statutory authority of the Act of 1890 might have been abused or exceeded, no suit would lie, and that the respondent's only remedy was by proceeding for compensation under the Land Acquisition Act, 1870. And, lastly,

1903.

Gaekwar Sarkar of Baroda v. Gandhi Kachrabhai Kasturchand.

he gravely argued that what the respondent really required in order to protect himself from the mischief caused by the negligence of the appellants was some additional accommodation works or something in the nature of accommodation works, which it was the respondent's business to define and submit for the approval of the Governor-General in Council.

It would be simply a waste of time to deal seriously with such contentions as these. It has been determined over and over again that if a person, or a body of persons, having statutory authority for the construction of works (whether those works are for the benefit of the public, or for the benefit of the undertakers, or, as in the case of a Railway, partly for the benefit of the undertakers and partly for the good of the public) exceeds or abuses the powers conferred by the Legislature, the remedy of a person injured in consequence is by action or suit, and not by a proceeding for compensation under the statute which has been so transgressed. Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others. They are granted on the condition sometimes expressed and sometimes understood—expressed in the Act of 1890, but if not expressed always understood—that the undertakers "shall do as little damage as possible" in the exercise of their statutory powers: *Lawrence* v. *Great Northern Railway Company* [1]; *Broadbent* v. *The Imperial Gas Company*; [2] *Ricket* v. *Metropolitan Railway Company*; [3] *Geddis* v. *Proprietors of the Bann Reservoir* [4]; *Bagnall* v. *London and North-Western Railway Company* [5].

Their Lordships are, therefore, of opinion that the appeal must be dismissed; but they think that it will be better that the injunction should be in general terms, restraining the defendants from flooding the lands of the respondent, or causing or permitting them to be flooded by the works of the Mehsana-Viramgaum Railway. It would be inconvenient if the Court were to direct the execution of specified works which it has no

[1] (1851) 16 Q. B., 643.
[2] (1857) 7 Deg. M. & G., 436.
[3] (1867) L. R., 2 H. L., 456 App. 175 (202).
[4] (1878) 3 A. C., 430 (455).
[5] (1861) 7 H. & N., 423; (1862) 1 H. & C., 544.

power to supervise, which might not be approved by the paramount authority, and which, after all might not effect the object in view.

Their Lordships will, therefore, humbly advise His Majesty that with this variation the order appealed from should be affirmed and the appeal dismissed. As regards costs, the order will be against both the appellants.

Appeal dismissed.

NOTE.

This case lays down the important doctrine that where statutory powers are exercised and statutory protection or indemnity is sought for work so done, the provisions of the statute must be strictly followed. If statutory authority is exceeded or abused, the remedy of the person injured in consequence is by suit or action in the Civil Court and not by a proceeding for compensation under the statute which has been so transgressed. This principle has been recently affirmed by the Privy Council in another case, *Sanuby* v. *London Water Commissioners*, (1906) A. C. 110, and had been previously affirmed repeatedly by the English Courts. See for instance, *Heron* v. *Rathmines*, (1892) A.C. 498; *North* v. *Pion*, 14 App. Cas. 612.

The authorities on the subject are elaborately reviewed and the principle deducible from them applied in *Rameswar Singh* v. *Secretary of State*, I. L. R. 34 Calc. 470, 5 C. L. J. 660. See also *Municipal Corporation* v. *Vasudeo*, 6 Bom. L. R. 899.

JOSEPH SMITH (PAUPER)

v.

CHARLES BAKER & SONS.

[*Reported in L. R., 1891) A.C., 325.*]

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July, 21.

The following judgments of their Lordships were delivered :

Lord Halsbury, L. C.—My Lords, this was an action originally tried in the County Court, and it is very important to bear in mind that only a limited appeal is allowed by law in actions so tried. There is no power to review the decision of fact arrived at in the County Court by any other tribunal than the County Court itself. A matter of law can be made the subject of appeal, but then only when the point has been raised at the trial before the learned Judge. That question was decided in *Rhodes* v. *Liverpool Commercial Investment Company* [1] In *Seymour* v. *Coulson* [2] the principle was affirmed that the point of law must be taken ; and finally in *Clarkson* v. *Musgrave* [3] where all the cases were reviewed, it was established (and I think has been accepted ever since) that the raising of the point of law at the trial is a condition precedent to any appeal from the decision of the County Court.

My Lords, I think there are good reasons for the enactment which has so limited an appeal, and in truth even where written pleadings render such precautions as the statute has enforced in the County Court less necessary, the same precaution has been constantly enforced where applications for a new trial have been made in the Superior Courts. It is obvious that it would be unjust to one of the parties if the other could lie by and afterwards, having failed on the contention that he in fact set up, be permitted to rely on some other point not suggested at the trial, but which if it had been suggested might have been answered by evidence : see *McDougall* v. *Knight.* [4]

Now, the first question therefore to consider here is, what question was in fact raised before the County Court Judge in this case, and consequently what question is open to your Lordships

[1] 4 C. P. D., 425.
[2] 5 Q.B.D., 359.
[3] 9 Q.B.D., 386.
[4] 14 App. Cas. 194.

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to consider on this appeal. The action was an action in which the plaintiff sued his employers for injuries sustained while in the course of working in their employment. He was employed in working at a drill while two other fellow-workmen were engaged in striking with a hammer at the drill, which he was employed to hold in the proper position. The nature of the employment was one which involved his attention being fixed upon the drill that it might be held in the proper position when receiving alternate strokes from the hammers wielded by his fellow-workmen. The place where he was employed was in a cutting, and in his immediate proximity another set of workmen were engaged in working in the cutting and taking stones out of it. For the purpose of this operation a steam crane was used, and occasionally, though not invariably, the stones lifted by the crane were swung over the place where the plaintiff was employed, and on the occasion which gave rise to the action a stone was swung over the plaintiff, and from some cause not explained and not attempted to be explained, the stone slipped from the crane, fell upon the plaintiff, and did him serious injury.

My Lords, the first point attempted to be argued at your Lordships' Bar was that there was no evidence to go to the jury of any negligence. Now, it is manifest upon the notes of the learned County Court Judge that no such point was taken at the trial, and it is therefore perfectly intelligible why no evidence is referred to with respect either to the crane, the manner of slinging the stone, or the mode in which the stone was fastened. Each of these things would have been material to consider if any such question had in the fact been raised. I will not myself suggest, or even conjecture, what was the cause of the stone falling, or what precautions ought properly to have been taken against such a contingency. What is, or is not, negligence under such circumstances may depend upon a variety of considerations. If, for instance, the only result of not properly fastening a stone may be that it will fall back again, and so necessitate a repeating of the operation, there may be no negligence in not taking great care in so fastening the stone as to render such an accident improbable, if not impossible. It may be simply a question of whether the extra pains taken in fastening the stone may not be an unnecessary waste of time and care, and those engaged in the operation may well be justified in risking

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the possibility of the stone falling. But if the stone is to be lifted under such circumstances, or, when lifted, swung over a workman beneath it, totally different considerations arise. And I think the unexplained and unaccounted for fact, that the stone was being lifted over a workman, and that it fell and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation. But whether that was so or not, the question does not here arise.

The objection raised, and the only objection raised, to the plaintiff's right to recover was that he had voluntarily undertaken the risk. That is the question, and the only question, which any of the Courts, except the County Court itself, had jurisdiction to deal with. Now, the facts upon which that question depends are given by the plaintiff himself in his evidence. Speaking of the operation of slinging the stones over the heads of the workmen, he said himself that it was not safe, and that whenever he had sufficient warning, or saw it, he got out of the way. The ganger told the workmen employed to get out of the way of the stones which were being slung. The plaintiff said he had been long enough at the work to know that it was dangerous, and another fellow-workman in his hearing complained that it was a dangerous practice.

My Lords, giving full effect to these admissions, upon which the whole case for the defendants depends, it appears to me that the utmost that they prove is that in the course of the work it did occasionally happen that stones were slung in this fashion over workmen's heads, that the plaintiff knew this, and believed it to be dangerous, and whenever he could he got out of the way. The question of law that seems to be in debate is whether upon these facts, and on an occasion when the very form of his employment prevented him looking out for himself, he consented to undergo this particular risk, and so disentitled himself to recover when a stone was negligently slung over his head or negligently permitted to fall on him and do him injury.

My Lords, I am of opinion that the application of the maxim "*Volenti non fit injuria*" is not warranted by these facts. I do not think the plaintiff did consent at all. His attention was fixed upon a drill, and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head

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without due precautions against its being permitted to fall. My Lords, I emphasize the word "negligenty" here, because, with all respect, some of the judgments below appear to me to alternate between the question whether the plaintiff consented to the risk, and the question of whether there was any evidence of negligence to go to the jury, without definitely relying on either proposition.

Now, I say that here evidence of negligence must by the form of procedure below be admitted to have been given, and the sole question to be dealt with is that with which I am now dealing. For my own part, I think that a person who relies on the maxim must shew a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proved by express consent; but if I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said, "I cannot look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself; I must attend to my drill. If you will not give me warning when the stone is going to be slung, at all events let me look out for myself, and do not place me under a crane which is lifting heavy stones over my head when you keep my attention fixed upon an operation which prevents me looking out for myself."

It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim, "*Volenti non fit injuria.*" I think they must go to the extent of saying that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited; but where it applies, it applies equally to a stranger as to any one else; and if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London

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streets; for no one (at all events some years ago, before the admirable police regulations of later years) could have crossed London streets without knowing that there was a risk of being run over.

It is, of course, impossible to maintain a proposition so wide as is involved in the example I have just given; and in both *Thomas* v. *Quartermaine* [1] and in *Yarmouth* v *France*,[2] it has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk. Bowen, L. J., carefully points out in the earlier case (*Thomas* v. *Quartermaine*[1]) that the maxim is not "*Scienti non fit injuria*," but "*Volenti non fit injuria*". And Lindley, L. J., in quoting Bowen L. J.'s distinction with approval, adds [3]: "The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff." And again, Lindley, L. J., says: "If in any case it can be shewn as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot in my opinion be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it." Again, Lindley, L. J., says: "If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon himself."

I am of opinion myself, that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which

[1] 18 Q. B. D., 685.
[2] 19 Q. B. D., 647.
[3] 19 Q. B. D., 660.

would involve the risk, and consented to take the risk upon himself. It is manifest that if the proposition which I have just enunciated be applied to this case, the maxim could here have no application. So far from consenting, the plaintiff did not even know of the particular operation that was being performed over his head until the injury happened to him, and consent, therefore, was out of the question.

As I have intimated before, I do not deny that a particular consent may be inferred from a general course of conduct. Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim, "*Volenti non fit injuria*," is completely justified.

I have hitherto treated the question apart from the specific findings by the jury. But I am not disposed to think that those findings were not justified upon the evidence presented. They found that the machinery for lifting the stone from the cutting was not reasonably fit for the purpose for which it was applied, *taken as a whole*. I think the jury meant—and if they did so mean, I am of opinion that they were right—that, looking to the risk incurred by the men working below and to the possibility of the crane when worked (as in fact it was worked) letting stones fall, the machinery was not reasonably fit for the purpose for which it was applied, that is to say, not reasonably fit for securing that stones should not fall from it when slung over men's heads And further, that if with such machinery the stones were being slung over men's heads, special warning ought to have been supplied to the men imperilled by such an operation, and that the employers were guilty of negligence in not remedying *such* a mode of working *such* machinery under *such* conditions of work.

I think the cases cited at your Lordships' Bar of *Sword* v. *Cameron*[1] and the *Bartonshill Coal Company* v. *McGuire*[2] established conclusively the point for which they were cited,

[1] 1 Sc. Sess. Cas. 2nd Series, 493.
[2] 3 Macq., 300.

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that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act. In *Sword* v. *Cameron*[1] it could hardly be doubted that the quarryman who was injured by the explosion of the blast in the quarry was perfectly aware of the risk; but nevertheless he was held entitled to recover notwithstanding that knowledge.

It seems to me that in the present case the right of the plaintiff to recover is far more clear than in *Sword* v. *Cameron*.[1] The interval given to the quarryman to seek shelter was the usual and ordinary one. But suppose in that case the employer had employed the quarryman to do something which by the very form of the employment prevented his hearing the signal which gave him warning to retreat? In this case, as I have pointed out, there was no warning and no signal, but the employer or his representative employed the plaintiff under such circumstances, as disabled him from using his eyes for protecting himself against the risk.

It seems to me, therefore, that this is a case in which the plaintiff is entitled to recover, and I therefore move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of the County Court Judge restored.

Lord Bramwell.—My Lords, with the leave of my noble and learned friend, Lord Watson, I address your Lordships now.

If this case came before me in the first instance, without any entanglement of statement of claim, finding of a jury, question of objections taken, and former decisions, I should hold it to be the plainest possible, and that the plaintiff had no claim in law or morality. I say this, not from any prejudice against the Employers' Liability Act. I am not certain it would not be a good thing to give a person injured as the plaintiff was a right to compensation, perhaps from the State, even where there was no blame in the master; even where there was blame in the servant. Men would not wilfully injure themselves, and then compensation would be a part of the cost of the work. But we have to deal with the law as it is.

Now, what are the facts of this case? The plaintiff was employed by the defendants. The defendants were engaged in

[1] 1 Sc. Sess. Cas. 2nd Series, 493.

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making a cutting for a railway, and of course had to remove what they excavated, and were doing so by putting the stones in a crate or in a sling, and raising them by a crane to the bank. The crane was turned so that the stones and sling passed over parts of the cutting, and therefore, over persons who might be standing or working on those parts. A stone so slung, and so being lifted, fell, or the parts of it fell, on the plaintiff, and most grievously hurt him. The plaintiff well knew of the possibility of such an accident. Those who were at work with him moved out of the way and escaped. The plaintiff did not, not knowing, as he says, of that particular movement of the crane. Now, how are the defendants to blame? There is no evidence that the crane was not the ordinary crane used for such purposes. No one says it was not. There is no evidence that lifting the stones as they were lifted—that is by slinging them and jibbing the crane—was not the ordinary and reasonble way of working. No one says it was not. There is no evidence that the particular stone was improperly slung. No one says it was. I have no objection to "*res ipsa loquitur*." I believe I was one of the first, if not the first, to use it in some cases about fifteen years ago; but it does not apply here. At least I cannot use it. I know that bales and barrels do not move and fall of their own accord. I do not know that stones slung carefully will not come apart and fall. My notion is that they will. I think I have often lifted up a piece of coal and found that the part I had hold of remained in the tongs and the rest broke away. I should think there might be some cleavage, I think it is called, which would prevent the parts holding together. This may be ignorance on my part. But if it is, it should have been removed by evidence, and there is none. Lord Coleridge and Lindley, L. J., are in the same state of ignorance, if it is one. Further, this is a claim which can only be maintained by virtue of the Employers' Liability Act. If there was negligence or unskilfulness in the slinging of the stone or working of the crane, it was not by any one in authority within that Act. Lastly, the plaintiff knew of the danger. Not of this particular stone, but generally that such stones might fall; yet he remained while it was passing over his head, not knowing, as he says, of this particular stone, but knowing that that kind of work was going

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on, and not looking out. His fellow-workmen looked out, did know, and got out of the way. There was no one to warn the plaintiff. No one says that it was the practice that there should be, and the plaintiff knew there was no one. This is the case pure and simple.

Now, let us see what is the case that comes before us. The particulars of claim say that "a stone or stones slipped from the crane chain and struck the plaintiff, by reason of the negligence of the defendants, they having failed to afford means of warning the plaintiff of the danger of continuing his work during the said craning operation, *or* of preventing the said stone or stones striking against him." The meaning of this is not certain. I think it is a complaint of want of "means of warning," whereby the plaintiff could prevent the stone striking against him. But it may be that it means a negligence in the slinging. So be it. If it is, there is no evidence of it. Then there is a claim that the accident was caused by the negligence of the foreman, whom the plaintiff was bound to and did obey. Of this there is no evidence.

Now, as to the evidence. I think it to the credit of the plaintiff that it was truthful, as it seems to me, substantially. He describes the operation, and he says that one of his fellow-workmen told the then ganger that it "was not safe to allow them to jib the stones over our heads"; that whenever he and his fellow-workmen saw them they got out of the way. He says he had been long enough at the work to know it was dangerous; that he heard another fellow-workman say to the ganger that it was dangerous; that he, the plaintiff, thought so, and told the crane-worker so; that if they had stood looking at the craning they would have been sent to the office, that is, discharged. One of the plaintiff's witnesses, West, says it was dangerous, and he so told the ganger; that he got out of the way when the stones were being jibbed; that he knew they had to look out for themselves, for there was no one to warn them. The ganger, called for the defendants, says he told them to get out of the way; evidently meaning step aside, not leave their work.

The following questions were left to the jury. 1. Was the machinery for lifting the stone, taken as a whole, reasonably

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fit for the purpose to which it was applied? I am sorry to say that the jury answered, "No." 2. Was the omission to supply means of warning a defect in the ways, works, machinery, and plant? The jury say "Yes." So that a man standing on the edge, as West says, would be part of the "plant"! 3. If so, the jury say the defendants were guilty of negligence in not remedying that defect. Well, "if so," it is true that they were negligent or wilful, if they knew of it, as I suppose they did. 4. Was the plaintiff guilty of contributory negligence? The jury say, "No." Well, I incline to think so. It was not negligence on his part; he did it wilfully. Except, indeed, that he was negligent in not doing what his mates did, *i.e.*, step on one side when the stone was coming, and not looking out for it. 5. Did the plaintiff voluntarily undertake a risky employment with knowledge of its risks? The jury say, "No." I wonder what they meant. Indeed, the question is wonderful. The answer, to make it favourable to the plaintiff, is necessarily negative, a negative pregnant of one affirmative and another negative-twins. It might mean that the plaintiff did not voluntarily undertake the employment, or that it was not risky, or that he had not a knowledge of its risks. In any and every sense it is untrue, and, I think, not to the credit of the jury who gave it. On this defendants' advocate applied for judgment, the plaintiff having admitted that he knew of the risk, and voluntarily incurred it. Judgment, however, was given for the plaintiff.

There was an appeal to the Queen's Bench Division, that the case ought not to have been allowed to go to the jury; because the plaintiff, having admitted he knew of the risk which caused the injury, voluntarily incurred it. The Court considered themselves bound or fettered by some decision of the Court of Appeal, which that Court had better solve, and dismissed the appeal, but very clearly indicated that their own opinion was the other way. Wills, J., said: "If I were an authority, I should have said that the evidence is all one way on the point of the man voluntarily accepting the risk, and I cannot draw the distinction between the man accepting the risk in the first instance, and his continuing in the employment under

[1] 19 Q. B. D., 647.

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circumstances which brought the risk to his mind." Wills, J., shews his dissent from the case of *Yarmouth* v. *France*.[1]

From this judgment there was an appeal on the same ground to the Court of Appeal, who reversed the judgment. Lord Coleridge says: "This case is clearly within the decisions that have been pronounced in the Court below, and in this Court, in which it has been held, and I think most properly held, that a person who is engaged to perform a dangerous operation takes the risk of the operation of the work that he is called on to perform. As to that, there never was any doubt before the Employers' Liability Act, nor since." I think that is a very neat and forcible way of putting it. He gives judgment for the defendants also on another ground, *viz.*, that there was no evidence of negligence in the defendants causing the accident. There certainly was none; but it is said this was not open to the defendants. Lindley, L. J., gives judgment the same way; his judgment is of extra importance, because it shews that *Yarmouth* v. *France*,[1] relied on for the plaintiff, is not, in the opinion of Lindley, L. J., who was party to it, against the defendants. His Lordship says: "If people will enter into dangerous employment, they do so without making other people liable for injuries they sustain." I cite also his Lordship's opinion to justify my own, that "the jury were led away by sympathy, for they found matters that were not in the least warranted by the evidence. I think there was no evidence of negligence at all." Lopes, L. J., says the same.

The case is now before your Lordships, and there cannot be a doubt how it ought to be decided, unless, by some miscarriage of jury or Judge, or counsel, the defendants are to be made liable where they are absolutely free from legal blame.

In the course of the argument I said that the maxim "*Volenti non fit injuria*" did not apply to a case of negligence; that a person never was volens that he should be injured by negligence—at least, unless he specially agreed to it; I think so still. The maxim applies where, knowing the danger or risk, the man is volens to undertake the work. And I think the maxim does apply here; for the complaint in the statement of claim (the only thing proved) was, that there was no one to

[1] 19 Q. B. D. 647.

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give notice when the stone was passing over where the plaintiff was at work. If this was wrong, the plaintiff knew of it and voluntarily undertook the risk. The case is different to a street accident, where a man is injured by the act of one between whom and him there is no relation. It is not dangerous apart from negligent driving. There is indeed a likeness. I admit that personal negligence in the master would make him liable; so also the use of dangerous plant not known to the servant.

If this is a maxim, is it any the worse? What are maxims but the expression of that which good sense has made a rule? It is a rule of good sense that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate. He can, if he chooses, say, "I will undertake the risk for so much, and if hurt, you must give me so much more, or an equivalent for the hurt." But drop the maxim. Treat it as question of bargain. The plaintiff here thought the pay worth the risk, and did not bargain for a compensation if hurt: in effect, he undertook the work, with its risks, for his wages and no more. He says so. Suppose he had said, "If I am to run this risk, you must give me 6*s.* a day and not 5*s.*," and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, "No; I will only give the 5*s.*!" None. I am ashamed to argue it. I refer to the judgments of Bowen and Fry, L. JJ., in *Thomas* v. *Quartermaine*.[1] It is not necessary to discuss *Yarmouth* v. *France*,[2] for Lindley, L. J., who was party to that judgment, is also party to that now appealed from, and thinks that whatever that decided, it decided nothing inconsistent with the judgment now under consideration. I respectfully express my dissent from that judgment in *Yarmouth* v. *France*,[2] and my concurrence with the observations of Wills, J, on it. The fourth question ought not to have been left to the jury. The plaintiff could not make a case without shewing his agreement with the defendants to do work involving this risk. If he had said he did not know of this practice of slinging the stones and passing them over the heads of other workmen,

[1] 18 Q. B. D., 685.
[2] 19 Q. B. D., 647.

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it would have been false, but a question for the jury. If left to the jury, technically the Judge ought to have directed them on the confession of the plaintiff to find for the defendants; a verdict the other way would have been perverse. I have always understood that when either party confesses to that which entitles the other side to a verdict, the Judge may so direct it as he ought to have done here. Would it not be absurd to say, I ask you to say whether so and so is the case? The plaintiff admits it is.

There is a confusion in the case. "*Volenti non fit injuria*" say the defendants. The plaintiff awswers, "But you were negligent." The defendants reply, "No, we were not." The plaintiff rejoins, "You did not take that objection at the trial." I do not agree. But supposing it was so, what has that got to do with the question? The plantiff advances this proposition, "You cannot reiy on '*Volenti non fit injuria*,' because that does not apply to a case of negligence. A man may be volens to encounter the natural dangers of a business, but not those superadded by negligence." I agree. But the plaintiff's proposition involves that he must make out negligence to take the case out of the rule. Assume that the defendants at the trial only took the objection, "*Volenti non fit injuria*," that meant, "You were willing to run the ordinary risks; if you say there was anything extraordinary, shew it." There certainly was none, for the reasons I have given. Why are we to say that the danger was enhanced when there is positively no evidence of it? What was the danger the plaintiff was willing to run? This: having stones slung in a particular way jibbed over his head, with the risk of their falling from bad slinging or other cause, and nobody to warn him when the jibbing caused the stone to come over him. How did the defendants enhance this? Did they cause the stone to be slung dangerously? As to no warning, the plaintiff knew he would have none. The plaintiff must have known that, if not inevitable or probable, the accident was possible. It is argued that there was a breach of duty in the defendants. What? What duty? Did the defendants ever undertake with the plaintiff that they would conduct their works otherwise than as they did that day? There is no such thing as abstract duty. Is there any evidence that the works were

not being conducted as they were when the plaintiff entered the defendants' service? It is not necessary to consider whether this action would lie if the work was more dangerous after the employment had been entered into, and the workman knew it. It was indeed once held that if an obstruction was put before a cabman's stable he might run into it, and, if damaged, recover. I think the right course for the workman would be to say "I entered your employment with a certain amount of risk, or with no risk, and you undertook to employ me. You have made it dangerous; that is a breach of your engagement, and I sue you." But it is immaterial in this case, for the work was unchanged in character, and was the same when he entered the service as when he was hurt. Besides, in these services every week there is a new engagement, and, therefore, his last week's work was under a contract made by the plaintiff, with full knowledge of the risk. If we suppose the contract was from week to week, till determined by notice, surely he is volens if he does not give the notice.

It is said that to hold the plaintiff is not to recover is to hold that a master may carry on his work in a dangerous way and damage his servant. I do so hold, if the servant is foolish enough to agree to it. This sounds very cruel. But do not people go to see dangerous sports? Acrobats daily incur fearful dangers, lion-tamers and the like. Let us hold to the law. If we want to be charitable, gratify ourselves out of our own pockets.

As to the authorities. It is a little amusing that Lindley, L. J., should be cited to shew that his very clear judgment in this case was wrong. As to the opinion of Lord Cranworth, I hold it in the highest respect, but it has no bearing on this case. He said the system was wrong. That system was indeed known to the workman, but not its danger.

But there is another question. I think it clear that there was no evidence of wrong, negligent or wilful, in the defendants. It is called negligence, but there was no negligence; what was done was done wilfully and intentionally. I am surprised it should be said as against the defendants, that there was no explanation or suggestion as to what was the cause of the disaster. There was not. But who was to give it? Not the

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defendants; the plaintiff was to make out his case. It may be that it is in the power of an employer conducting operations such as these to prevent such injuries as this. But who is to prove it? I say, then, there was no evidence of wrong, negligence, or wilfulness in the defendants. It is said that this is not open to them; that the objection was not taken at the trial. I think it clearly was. The defendants applied for a non-suit at the end of the plaintiff's case. Why? Because there was no evidence for the jury. When it was said the thing was intrinsically dangerous, the defendants used the maxim, "*Volenti non fit injuria.*" If this question was not open to the defendants, why was not that objection taken in the Queen's Bench Division and Court of Appeal? A new trial might have been granted The case is wholly different from *Clarkson* v. *Musgrave*,[1] where the objection in the Appeal Court was of a wholly different character from that in the County Court, and does not, as it were, arise out of it as here. Here the defendants say, "There is no evidence of wrong in us." Answer: "Your very work is dangerous." Reply: "But you knew it, and undertook it with full knowledge of the extent of the danger." Whether taken or not it should be open to the defendants. Error is *caput lupinum*. Up to the last moment, if there is irremediable error, it may be objected to. That was here. On this ground also the defendants should succeed. Something ought to be done, a new trial granted, if necessary, to prevent the defendants being made liable to pay damages which, in the opinion of many Judges, there was no ground for claiming against them, and which never would have been claimed but in the hope of an unjust verdict from a jury.

Fortified by the opinion of those Judges, I should think this a plain case for the defendants, but that I know your Lordships think otherwise. I am of opinion that the judgment should be affirmed.

Lord Watson.—My Lords, this action was brought in the County Court of Yorkshire by the appellant, for recovery of damages from the respondent firm, who are railway contractors, in respect of personal injuries sustained by him in their service. The jury, under direction of the Judge, returned six specific

[1] 9 Q. B. D., 386.

findings. Three affirmed facts implying fault on the part of the respondents, one negatived contributory negligence, and another assumption of risk by the appellant, whilst the sixth assessed damages at £100. Judgment was delayed in order to give either party an opportunity of moving to have it entered in their favour. At the hearing the respondents confined their challenge of the verdict to the finding relating to risk. They moved for a non-suit, "on the ground that the case ought not to have been allowed to go to the jury, the plaintiff having admitted that he knew of the risk and voluntarily incurred it."

The County Court Judge refused the motion, and entered judgment for the plaintiff for £100. The defendants appealed to a Divisional Court, consisting of Huddleston, B, and Wills, J., who, in consequence of doubts as to the effect of certain recent cases, without expressing any final opinion, took the course of dismissing the appeal, with leave to the defendants to carry the case to the Court of Appeal, in order to obtain an authoritative exposition of the law involved in the maxim, "*Volenti non fit injuria.*"

The case then came before an Appeal Court, composed of Lord Coleridge, C. J., with Lindley and Lopes, L. JJ., who recalled the decree obtained by the plaintiff in the County Court, and directed judgment to be entered for the defendants. In delivering judgment Lord Coleridge dealt with the point which had been raised in the County Court, and expressed his opinion that the Judge erred in refusing to hold that the plaintiff undertook to perform a dangerous operation, and took upon himself the risk attending that operation. His Lordship then proceeded to consider the findings with respect to fault, and came to the conclusion that there was no evidence of negligence to go to the jury. Lindley, L. J., rested his decision upon the second of these grounds, being of opinion that, according to the evidence, the plaintiff's injuries were the result of "pure accident without any element of negligence in it." In expressing the same view, Lopes, L. J., remarked that the "vexed question with regard to the application of the principle of '*Volenti non fit injuria*,' which arose in *Thomas* v. *Quartermaine*[1] and *Yarmouth* v. *France*,[2] happily does not arise in this case."

[1] 18 Q. B. D., 685. [2] 19 Q. B. D., 647.

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The provisions of Sect. 120, and following clauses of the County Courts Act, 1888 (51 & 52 Vict., c. 43), do not appear to have been brought under the notice of the learned Judges of the Appeal Court. These enactments appear to me to exclude all right of appeal upon questions of law which were not raised and submitted at the trial to the County Court Judge. The reasoning of Lord Field and Cave, J., in *Clarkson* v. *Musgrave*[1] although the decision turned upon the terms of the County Courts Act, 1875, is *in pari materia*, and is, in my opinion, equally applicable to the statute of 1888.

In this case, the contention that there was no evidence of negligence to go to the jury was never mooted in the Court of first instance. It was not raised in the notice of appeal to the Divisional Court, and it was neither included in the leave given by that Court, nor referred to in the notice of motion before the Appeal Court. I am, in these circumstances, of opinion that the findings of the jury bearing upon the question of the defendants' fault must be taken as conclusive. The Legislature has purposely taken away from them the right to raise, and from your Lordships the right to entertain, any question of law or fact affecting the validity of these findings. The only finding with which, in my opinion, this House has jurisdiction to deal, is embodied in the question put by the presiding Judge: "Did the plaintiff voluntarily undertake a risky employment with a knowledge of its risks?" and the answer of the jury, which was, "No."

Whilst I am of opinion that it is not within the jurisdiction of any Court of review to set aside jury findings which were not impeached in the County Court, it does appear to me to be legitimate and necessary in the present case to examine the findings which relate to negligence, in the light of the facts disclosed in evidence, not with the view of disturbing them, but for the purpose of appreciating their effect and ascertaining the character of the risk which the plaintiff is alleged to have voluntarily undertaken. The facts in evidence do not raise any question of credibility. The real controversy, both in the County Court and at your Lordships' Bar, has been directed to the inferences which ought to be derived from them.

[1] 9 Q. B. D., 386.

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The plaintiff was employed by the defendacts from December, 1887, until the 13th of April, 1888, in a rock cutting upon the Halifax High Level Railway. A line of rails upon which there was a travelling steam crane and tackle ran along the edge of the cutting; and the quarried stone was lifted and deposited in trucks by means of the crane. The larger stones were secured by winding the chain round them and hitching the end hook into one of its links; the smaller ones were packed in skips or crates. The plaintiff was engaged in loading the crane until the beginning of February, and after that date in assisting to drill holes for blasting. On the 13th of April he was turning a drill-rod, which two of his fellow-workmen struck alternately with their hammers, when a large stone, which was in course of being raised by the crane, fell upon him, and inflicted the injuries complained of. His fellow-workmen saw the falling stone just in time to get out of its way; but the plaintiff, who was stooping at his work, had not time to make his escape.

No evidence was led on either side as to the character of the stone which fell, to the condition of the chain, or to the actual mode in which the stone was secured. It appears to have been the practice during the whole period of the plaintiff's employment to permit the crane load, whenever it was found convenient, to be swung directly above the workmen engaged in drilling. At its first start the load swung clear of them, but after it had attained some elevation, the arm of the crane was "jibbed," or deflected to one side or the other, as suited the convenience of those who were loading the trucks. Until the crane was jibbed, the plaintiff, and others employed in drilling, had no means of knowing whether its load would or would not pass over their heads.

Neither of the parties disputed at the trial that the practice in question involved some degree of peril to the workmen employed in drilling. The plaintiff in his evidence stated that he had been long enough at that kind of work to know that the practice was dangerous. He also said, "I had been at the same class of work in the same cutting. They were jibbing over our heads every day." "Sometimes we could see the stones being craned up, and when we saw them we got out of the way." Hanson, a witness for the defendants, who was their foreman in charge at the time of the accident, said that "the men ought to have

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stopped work while the stone was being jibbed round. *That would be the safe way.*" He admitted that no notice was given them; and he also said, "If the men left their work every time the crane jibbed, it would take two and a half hours to do one hour's work." There is evidence to the effect that one at least of his fellow-workmen had previously complained to the foreman of the danger of slinging stones over their heads. There is no evidence to shew that the practice was necessary to the conduct of the defendant's operations and could not have been discontinued without interruption of their work.

The questions touching negligence which were left to the jury, and the answers returned by them, were: "(1) Was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied? (Answer) No. (2) Was the omission to supply special means of warning when the stones were being jibbed a defect in the ways, works, machinery, and plant? (Answer) Yes. (3) If so, were the employers (or some person engaged by them to look after the condition of the works, etc.) guilty of negligence in not remedying that defect? (Answer) Yes."

The frame of these questions may be open to criticism; but on a fair construction of them, together with the answers given, what the jury meant to affirm seems to me to be tolerably plain. They were not, in my opinion, meant to represent three different phases of negligence, but to affirm three different propositions constituting one form of negligence, namely, the neglect of the defendants to take proper precautions for protecting their employés from the possible consequences of a faulty system of working the crane. It is plain that the *first* question had no reference to any specific flaw in the crane or its tackle, because it expressly relates to the machinery "taken as a whole"—words which, as I understand them, were intended to cover the arrangement and use of the crane and its tackle considered in their relation to other departments of work carried on in the cutting. Accordingly, the first answer of the jury appears to me to affirm that the system of using the crane was not reasonably fit for its purpose, inasmuch as it exposed workmen in another department to unnecessary danger. The *second* affirms that the use of the crane, without warning to the workmen over whose heads its

load was jibbed, constituted a defect in the works; and the *third*, that the defendants, or their foremen, were negligent in respect of their failure to remedy that defect; I so construe the findings of the jury, because I feel bound, in the absence of any exception to the charge of the presiding Judge, to assume that these questions, as explained by him to the jury, did not embrace any cause of action not arising on the pleadings, and that they did fairly raise the issues disclosed in the plaintiff's pleadings and evidence.

It must be kept in view that, owing to the shape in which the case was submitted to them, the jury were invited to consider these three questions apart from the question of risk, or, in other words, upon the footing that the risk of a stone falling from the crane had not been undertaken by the plaintiff. The incidence of the risk was the subject-matter of a separate question. In that aspect of the findings with regard to negligence, I am not prepared to concur in the observations made upon them by the Court of Appeal. If the plaintiff did voluntarily undertake risk from which he suffered, there could, as a matter of course, be no negligence imputable to the defendants. If, on the contrary, the principle of "*Volenti non fit injuria*" were eliminated from the case, there would, in my opinion, be reasonable and sufficient warrant in the evidence for the verdict returned by the jury.

It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by Lord Cranworth, and other noble and learned Lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act (43 & 44 Vict., c. 42) that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself. In *Sword* v. *Cameron*[1] the First Division of Court of Session found a master liable in damages to a quarryman in his employment, who was injured by the firing of a blast before

[1] 1 Sc. Sess. Cas. 2nd Series, 493.

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he had time to reach a place of shelter, although it was proved that the shot was fired in accordance with the usual and inveterate practice of the quarry. That case was cited in *Bartonshill Coal Company* v. *Reid*[1] in support of the proposition that the doctrine of colluborateur was unknown to the law of Scotland; but Lord Cranworth pointed out[2] that the decision did not turn upon the negligence of the fellow-workman who fired the shot, and expressly stated that it was justifiable, on the ground that "the injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions." The Lord Chancellor (Chelmsford) expressed the same view in *Bartonshill Coal Company* v. *McGuire*.[3] The judgment of Lord Wensleydale in *Weems* v. *Mathieson*[4] clearly shews that the noble and learned Lord was also of opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

The main, although not the sole, object of the Act of 1880, was to place masters who do not upon the same footing of responsibility with those who do personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they intrust the duty of superintendence as if it were their own. In effecting that object, the Legislature has found it expedient, in many instances, to enact what were acknowledged principles of the common law. Sect. 1, sub-s. 1 provides that the employer shall be liable in cases where a workman is injured by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer. I see no reason to doubt that an arrangement of machinery and tackle, which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business, constitutes a defect in the condition of the works within the meaning of the sub-section. Sometimes (as in the present case) when the danger is not constantly present, but recurs at intervals, the defect may be cured by giving the workmen timely warning of its approach. The employer may in such cases protect himself, either by removing the source of danger, or by

[1] 3 Macq., 266, 273.
[2] 3 Macq., 289-90.
[3] 3 Macq., 310.
[4] 4 Macq., 226.

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making provision for due notice being given. Should he adopt the latter course, he will still be exposed to liability if injury results from failure to give warning through the negligence of himself or of his superintendent.

The only question which we are called upon to decide, and I am inclined to think the only substantial question in the case, is this, whether, upon the evidence, the jury were warranted in finding as they did, that the plaintiff did not "voluntarily undertake a risky employment with a knowledge of its risks." Whether the plaintiff appreciated the full extent of the peril to which he was exposed or not, it is certain that he was aware of its existence, and apprehensive of its consequences to himself; so that the point to be determined practically resolves itself into the question whether he voluntarily undertook the risk. If, upon that point, there are considerations *pro* and *contra*, requiring to be weighed and balanced, the verdict of the jury cannot be lightly set aside. The defendants' case is that the evidence is all one way; that the plaintiff's continuing in their employment, after he had become aware and had complained of the danger, of itself affords proof absolute and conclusive of his having accepted the risk of a stone falling in the course of its transit from the quarry to the loading bank.

The maxim, "*Volenti non fit injuria*," originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave, in order that he might share in the price, suffered a serious injury; but he was in the strictest sense of the term volens. The same can hardly be said of a slater who is injured by a fall from the roof of a house; although he too may be volens in the sense of English law. In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's. When, as is commonly the case,

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his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case.

It is material to notice that the Employers' Liability Act, under which the present action was brought, by Sect. 2, Subsect. 3, provides that a workman shall have no right to compensation for injuries caused by reason of any defect or negligence which is specified in Sect. 1, in any case where "he knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence." I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer; but as was forcibly pointed out by Lord Esher, M.R., in *Thomas* v. *Quartermaine*[1] in cases where the employer and his deputies were personally ignorant of the defect, it is made a condition precedent of the workman's right to recover that he shall have given them information of it before he was injured. That does not lead me to the conclusion that the provisions of the Employers' Liability Act wholly exclude the application of the doctrine "*Volenti non fit injuria*" to claims falling within the scope of the Act; but it does, in my

[1] 18 Q. B. D. 689, 690.

opinion, shew that the Legislature did not intend that the statutory remedy given to the workman should be taken away simply by reason of his continuing in the same employment after he became aware of the defect from which he ultimately suffered.

There are many kinds of work in which danger is necessarily inherent, where precautions such as would ensure safety to the workman are either impossible, or would only be attainable at any expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his nerve and skill; and, in the absence of express stipulation to the contrary, the risk is held to be with him and not with the employer.

On the other hand, there are cases in which the work is not intrinsically dangerous, but is rendered dangerous by some defect which it was the duty of the master to remedy. In cases of that description the relations of the workman to the peril are so various that it is impossible to lay down any rule regarding the operation of the maxim which will apply to them all alike, and I shall refer to two instances only by way of illustration. The risk may arise from a defect in a machine which the servant has engaged to work of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result and, notwithstanding, continued to work, I think that, according to the authorities, he ought to be regarded as volens. The case may be, very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department over which he has no control. The present case belongs to that category. There was no intrinsic danger in the operation of drilling in which the plaintiff was engaged; the peril from which he suffered was not evoked by his act, but was brought into contact with him by workmen employed in a different operation.

I should be prepared to hold that, apart from the Act of 1880, the plaintiff's remedy was not necessarily taken away by the mere fact that, in the acknowledge of the risk and after remonstrance, he continued to work. In the circumstances of this case the question whether he had accepted the risk is one of fact; there is no arbitrary rule of law which decides it. The

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complaints made to the foreman by his fellow-workman, coupled with the fact of their continuing to work, might be fairly construed as an intimation to the defendants that they must either discontinue the vicious practice of slinging stones over the heads of their workmen or take the consequences. It was a protest against the practice, which does not naturally or necessarily imply that they were willing to submit to it or to accept the risk of it. I am confirmed in that view by the decision in *Sword* v. *Cameron*,[1] which came very near in its circumstances to the present case. There the dangerous practice consisted in firing a shot at so short an interval after notice to the workmen that they had not time to reach a place of safety, and the pursuer had continued to work until he was injured, in full knowledge of the practice and its attendant risks. The Court of Session held that the maxim, "*Volenti non fit injuria*" did not apply; and it appears to me that, in *Bartonshill Coal Company* v. *Reid*,[2] Lord Cranworth approved of the judgment. It is true that in the *Bartonshill cases* there was no question directly raised in regard to the maxim; but the noble and learned Lord examined the facts of *Sword* v. *Cameron*[1] in detail, and expressed the opinion, not that the decision might be explained, but that it was justifiable in the circumstances of the case.

This case, however, is under the statute of 1880, and, as already indicated, I am of opinion that the mere fact of the plaintiff having continued in the employment of the defendants cannot defeat his statutory claim. I therefore concur with the majority of your Lordships in thinking that the order of the Court of Appeal must be reversed, and the judgment of the County Court Judge restored.

Lord Herschell—(after stating the facts and course of the proceedings set forth above, continued as follows):—

My Lords, the first argument addressed to your Lordships by the learned counsel for the appellant was that it was not competent for the respondents to raise the objection that there was no evidence of negligence, no such point having been made in the County Court. In support of this proposition he cited the case of *Clarkson* v. *Musgrave*,[3] which is a distinct authority to that effect. The learned

[1] 1 Sc. Sess. Cas., 2nd Series, 493.
[2] 3 Macq., 290.
[3] 9 Q. B. D., 386.

Counsel for the respondents did not impeach the authority of that decision, or invite your Lordships to overrule it. I see no reason to think the decision was erroneous. It would, in my opinion, be very mischievous if an appeal from a decision of a County Court could be sustained on the ground that there was no evidence to go to the jury when that point had not been raised before the County Court Judge. In the present case it is perfectly clear that no such objection was ever taken. At the close of the evidence for the plaintiff the only ground submitted for a non-suit was that the plaintiff had himself admitted that he knew of the risk, and voluntarily incurred it, and it was on this ground that the defendants applied to have judgment entered for them, notwithstanding the finding of the jury. Indeed, in the notice of motion in the Queen's Bench Division on appeal from the County Court, the ground that there was no evidence of negligence is nowhere taken. I think, then, it was not competent for the Court of Appeal to inquire whether there was any evidence of negligence. For the reasons I have given, I do not think it is necessary to determine whether there was such evidence in the persent case, but I am far from being satisfied that there was not. No satisfactory explanation was given of the cause which led to the fall of the stone and the consequent injury to the plaintiff. It is said that whilst in some cases the fall of a substance, such as a bale of cotton, which is being raised by a crane would, if unexplained, be evidence of negligence, the fall of a stone from a crane, as in the present instance, is not so, because stone is apt to disintegrate and thus to fall ; I am not prepared to admit that it is beyond the reasonable power of an employer conducting operations such as those in question to prevent the risk of injury to life or limb of those who are working at the locality over which the stones are being lifted. I should have thought it would have been possible to use such appliances as under ordinary circumstances to prevent the risk of the stones falling ; but if it be not possible to do so, and the stones cannot pass over those engaged in other operations below without serious danger to them, it would certainly be within the employer's power to warn them when it is necessary to desist from work, and get out of the way of the impending risk. It seems to me, then, that the employer in such a case is in this dilemma : either it was reasonably practicable for him to use appliances by which the

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accident would have been avoided, in which case he should have done so, or, if it was not, sufficient warning should have been given to those endangered to enable them to escape the danger. It is of course possible that the employer might have shewn that neither of these courses was reasonably practicable. But that is immaterial. All that I am concerned with at the present moment is whether the accident which happened the afforded evidence of negligence.

It was of course open to the respondents to contend that, after the admission of the plaintiff as to his knowledge of the dangerous character of the work, the case ought to have been withdrawn from the jury, and judgment entered for them, and this was the point strenuously argued at your Lordships' Bar on their behalf. It was said that the maxim, "*Volenti non fit injuria*," applied, and effectually precluded the plaintiff from recovering. The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. The maxim has no special application to the case of employer and employed, though its application may well be invoked in such a case. The principle embodied in the maxim has sometimes, in relation to cases of employer and employed been stated thus:—A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the proposition thus stated there is no difficulty in giving an assent, provided that what is meant by engaging to perform a dangerous operation, and by the risks incident thereto, be properly defined. The neglect of such definition may lead to error. Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain, that a wrong has been done him, even though the cause from which he suffers might give to others a right of action. For example, one who has agreed to take part in an operation necessitating the production of fumes injurious to health, would have no cause of action in respect of bodily suffering or inconvenience resulting therefrom, though another person residing near to the seat of these operations might well maintain an action if he sustained such injuries from the same cause.

But the argument for the respondents went far beyond this. The learned counsel contended that, even though there had been negligence on the part of the defendants, yet the risk created by it was known to the plaintiff; and inasmuch as he continued in the defendants' employment, doing their work under conditions, the risk of which he appreciated, the maxim, "*Volenti non fit injuria*" applied, and he could not recover; that his proper course, if he wished to avoid the risk of his employers' negligence, was to refuse to perform the work under such conditions. Their argument necessarily went this length, for the facts on which it was grounded were simply these: that the plaintiff had admitted, that he knew the work was dangerous. I am not quite sure that he was not referring in his answer to the character of the work generally, rather than to the special danger arising from jibbing the stones overhead; but in a subsequent answer he stated that he had heard a fellow-workman say to the ganger that it was dangerous to jib stones and skips over their heads, and that he thought so too.

It is obvious that the degree in which the work was dangerous depended entirely on the conditions under which it was carried on and the amount of care exercised. It would be practically unimportant or very great according to the character of the appliances used, the mode in which the stone was slung, and the presence or absence of warning at the critical time. In the present case it must be taken on the finding of the jury that the danger was at least enhanced and the catastrophe caused by the negligence of the defendants; and the question for your Lordships' consideration is whether, under such circumstances, the fact of the plaintiff having continued to perform the duties of his service precludes his recovery in respect of this breach of duty because the acts or defaults which constituted it were done "*volenti*."

There may be cases which a workman would be precluded from recovering even though the risk which led to the disaster resulted from the employers' negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that, if with this knowledge he continued to perform his work and thus sustained the foreseen injury, he could not maintain an action to

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recover damages in respect of it. Suppose, to take an illustration, that owing to a defect in the machinery at which he was employed the workman could not perform the required operation without the certain loss of a limb. It may be that if he, notwithstanding this, performed the operation, he could not recover damages in respect of such a loss; but that is not the sort of case with which we have to deal here. It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable, not even, I should judge, as probable. Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employers' breach of duty? I cannot assent to the proposition that the maxim, "*Volenti non fit injuria*," applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong.

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employers' negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim, "*Volenti non fit injuria*," becomes applicable.

It was suggested in the course of the argument that the employed might, on account of special risk in his employment, receive higher wages, and that it would be unjust that in such a case he should seek to make the employer liable for the result of

the accident. I think that this might be so. If the employed agreed, in consideration of special remuneration, or otherwise, to work under conditions in which the care which the employer ought to bestow, by providing proper machinery or otherwise, to secure the safety of the employed, was wanting, and to take the risk of their absence, he would no doubt be held to his contract, and this whether such contract were made at the inception of the service or during its continuance. But no such case is in question here. There is no evidence that any such contract was entered into at the time when the plaintiff was first engaged, and the fact that he continued work notwithstanding the employer's breach of duty affords no evidence of such special contract as that suggested.

It is to be observed that the jury found that the plaintiff did not voluntarily undertake a risky employment with knowledge of its risks, and the judgment of the County Court, founded on the verdict of the jury, could only be disturbed if it were conclusively established upon the undisputed facts that the plaintiff did agree to undertake the risks arising from the alleged breach of duty. I must say, for my part, that in any case in which it was alleged that such a special contract as that suggested had been entered into I should require to have it clearly shewn that the employed had brought home to his mind the nature of the risk he was undertaking and that the accident to him arose from a danger both foreseen and appreciated.

I have so far dealt with the subject under consideration as matter of principle apart from authority; but it appears to me that the view which I have taken receives strong support from the approval with which Lord Cranworth refers to the case of *Sword* v. *Cameron* [1] in his judgment in the case of *Bartonshill Coal Company* v. *Reid*.[2]

In *Sword* v. *Cameron* [1] it was the pursuer's duty to work near a crane, and other servants were employed to blast the rock. The practice was to give a signal to the men by the word "fire." It was then the duty of the men employed at the crane to hasten away. The interval allowed before firing varied

[1] 1 Sc. Sess. Cas., 2nd Series, 493.
[2] 3 Macq., 290.

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from one minute to two. The pursuer was struck when he had got fifty or sixty yards off. An interval of about two minutes elapsed between the order to fire and the explosion, and it was stated to have frequently occurred that by the effects of the explosion stones flew over the heads of the retreating workmen. Lord Cranworth said: "This case may be justified without resorting to any such doctrine as that a master is responsible for injuries to a workman in his employ occasioned by the negligence of a fellow-workman engaged in a common work. The injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions. It is to be inferred from the facts stated, that the notices and signals given were those which had been sanctioned by the employer, and that the workmen had been directed to remain at their work near the crane till the order to fire had been given, and then that after the interval of a minute or two the explosion should take place. The accident occurred not from any neglect of the man who fired the shot, but because the system was one which did not enable the workmen at the crane to protect themselves by getting into a place of security."

This case appears to me to be analogous to the present, and the ground upon which Lord Cranworth bases the liability of the employer to be applicable to it. It will be noticed that in that case the defective system which created the risk, and from which the pursuer suffered, was known to him, and that he continued his work notwithstanding this knowledge; yet it never appears to have occurred, either to the Scotch Court or to Lord Cranworth, that this absolved the employer from liability.

In *Yarmouth* v. *France*,[1] the plaintiff was subjected to a risk owing to a defect in the condition of what was held to be plant within the meaning of Sect. 1 of the Employers' Liability Act. He complained of this to the person who had the general management of the defendant's business, but was told nevertheless to go on with his work. He did so, and sustained the injury for which he brought his action. The County Court Judge gave judgment for the defendant on the ground that the plaintiff must be assumed to have assented to take upon himself

[1] 19 Q. B. D., 647.

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the risk, on the authority of *Thomas* v. *Quartermaine*,[1] to which case I will refer immediately. The Court of Appeal ordered a new trial. Lindley, L. J., said: "The Act cannot, I think, be properly construed in such a way as to protect a master who knowingly provides defective plant for his workmen, and who seeks to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use." And further on he observes: "If nothing more is proved than that the workman saw danger, reported it, but on being told to go on went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of taking the risk upon himself."

I think that the judgment in *Yarmouth* v. *France* [2] was pefectly right; but I should not lay the same stress as Lindley, L. J., did upon the fact that the workman had remonstrated against the risk to which he was exposed, and on being told to continue his work did so to avoid dismissal. For the reasons which I have given, I think that where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine, "*Volenti non fit injuria*," which in my opinion has no application to such a case. It appears to me that Sect. 2, Sub-sect. 3 of the Employers' Liability Act indicates that the Legislature regarded this as the law.

The defendants' counsel naturally placed his main reliance upon the case of *Thomas* v. *Quartermaine*. [1] The plaintiff there was employed in a room in the defendants' brewery, where a boiling and a cooling vat were placed. A passage which was in parts only three feet wide ran between these two vats, the rim of the cooling vat rising sixteen inches above the passage. The plaintiff went along this passage in order to get from under the boiling vat a board which was used as a lid, and as this lid stuck,

[1] 18 Q. B. D., 685.
[2] 19 Q. B. D., 647

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the plaintiff gave it an extra pull, when it came away suddenly, and the plaintiff, falling back into the cooling vat, was scalded. The County Court Judge held that there was evidence of defect in the condition of the works in there being no sufficient fence to the cooling vat. He found that the condition of the vat was known to both the plaintiff and the defendant, and that the plaintiff had not been guilty of contributory negligence, and he gave judgment for him. The case was carried to the Court of Appeal where the learned Judges, Bowen and Fry, L. JJ. (the Master of the Rolls dissenting), affirmed a decision of the Divisional Court directing judgment to be entered for the defendant.

The judgments of the learned Judges forming the majority in that case were chiefly occupied by a consideration of the provisions of the Employers' Liability Act. It appears to have been contended in that case that the effect of the statute was to preclude the employer from relying on the maxim, "*Volenti non fit injuria*," in cases where, but for the statute, such a defence would have been open to him. But it is to be observed that in the case there under consideration, the Country Court Judge had found that the defendant was himself aware of the defective condition of his works, and if he had not taken reasonable care so to carry on his business as not to subject those employed by him to undue risk, he would, according to the law laid down by this House in *Bartonshill Coal Company* v. *Reid*, [1] be *prima facie* liable to an action. The learned Judges, however, came to the conclusion that the defendant was entitled to judgment, because the maxim, "*Volenti non fit injuria*," applied, the County Court Judge having found that the condition of the vat was known to the plaintiff as well as the defendant. I find myself unable to concur in the view that this could properly be held under the circumstances as matter of law. The fact seems to have been lost sight of that the danger to the plaintiff did not arise from the circumstance that he had to pass from one part of the premises to the other, in proximity to the vats, even if this would have justified the conclusion arrived at. The accident arose from an operation being performed by him in the neighbourhood of the vats, namely, getting a board which served as a lid from under one of them. As far as appears, this was amongst

[1] 3 Macq., 266.

the ordinary duties of his employment, and if it was assumed that there was a breach of duty on the part of the employer in not having the vats fenced, as it obviously was, since if there had been no breach of duty it would not have been necessary to inquire whether the maxim, "*Volenti non fit injuria*," afforded a defence, it seems to me that it must have been a question of fact, and not of law, whether the plaintiff undertook the employment with an appreciation of the risk which arose on the occasion in question from the particular nature of the work which he had to perform. If the effect of the judgment be that the mere fact that the plaintiff after he knew the condition of the premises continued to work and did not quit his employment, afforded his employer an answer to the action even though a breach of duty on his part was made out, I am unable, for the reasons I have given, to concur in the decision.

I think that the judgment of the Court below in the case now before your Lordships ought to be reversed, and judgment for the plaintiff restored.

Lord Morris.—My Lords, the circumstances of this case have been so fully stated by your Lordships, who have already spoken, that it is unnecessary for me to repeat them. I concur in the conclusion arrived at by the Court of Appeal, that the findings of the jury as to negligence were not warranted by the evidence, and that there was no evidence of negligence conducing to the plaintiff's injury; but I do not consider that it therefore follows that judgment should be entered for the respondents.

The action was not one in the Superior Courts, and it must be governed by the statutes regulating appeals from the County Courts. Now, in the present case no objection was made at the trial on the part of the respondents that there was no evidence upon which the jury could find there was negligence on their part; nay, more, in the notice of motion, by way of appeal, in the Queen's Bench Division, no objection was taken that there was no evidence of negligence. The question of law raised at the trial, both at the close of the plaintiff's case in asking for a non-suit, and at the close of the entire case in asking for judgment, was, that the plaintiff having admitted that he knew the risk and voluntarily incurred it, the defendants were entitled to succeed. No question of law was raised as to there being

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no evidence to go to the jury to establish the defendants' negligence.

The Court of Appeal decided the case upon a question of law not taken at the trial. I can find no reference in any of the judgments in the Court of Appeal as to their competency to entertain and decide upon a point not made at the trial, nor does the case of *Clarkson* v. *Musgrave*[1] appear to have been cited. It is an express decision, and one in which I entirely concur, that it is a condition precedent to the right of appeal that the question of law upon which it is desired to appeal should have been raised before the County Court Judge at the trial. If the point, that there was no evidence of negligence, had been made by the defendants at the trial, I am of opinion they would be now entitled to judgment; but in my opinion, that point is not now open, and the case must be dealt with, assuming the findings of the jury as to the negligence of the defendants. The findings were: "*1st.* Was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied?" The jury found, "No." "*2nd.* Was the omission to supply special means of warning, when the stones were being jibbed, a defect in the ways, works, machinery, and plant?" The finding was, "Yes." "*3rd.* If so, were the employers, or some person engaged by them to look after the condition of the works, guilty of negligence in not remedying that defect?" (Answer) "Yes."

Notwithstanding these findings, the respondents have argued that they are entitled to judgment, inasmuch as the appellant admitted he knew of the risk, and voluntarily incurred it. His evidence on that point was: "I am a navy, and am accustomed to this particular work. I have been at it long enough to know it is dangerous." And again: "I told the crane-driver that it was not safe to jib stones over our heads."

On the hypothesis that the respondents were guilty of negligence conducing to the accident, which is the result of the findings of the jury unchallenged at the trial, the respondents still rely on the application of the maxim, "*Volenti non fit injuria*," and the decision in the case of *Thomas* v. *Quartermaine*,[2] as precluding the plaintiff from recovering. The facts of that case

[1] 9 Q. B. D., 386. [2] 18 Q. B. D., 685.

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are few and simple. A passage ran between a cooling and a boiling vat in the defendants' brewery. The plaintiff went along the passage to pull a board from under the boiling vat, and in so doing he pulled too strongly, and the board coming out suddenly he fell back into the cooling vat and was injured. The County Court Judge held that there was no sufficient fence to the cooling vat, and that the condition of the cooling vat was known to both plaintiff and defendant. This latter finding was a mere truism, for both plaintiff and defendant must have seen and known that the cooling vat was not fenced. I concur in the decision of the Court of Appeal, and in the judgments of Bowen and Fry, L. JJ., in that case. In the first place, the danger from the narrowness of the passage and the unfenced state of the cooling vat, if it was a danger, was patent to the plaintiff, a workman employed there. Neither he nor any one else complained of danger. There was no evidence that the passage was dangerous in the ordinary use of it. The accident happened in an extraordinary use of the passage—*viz.*, the fall of the plaintiff while pulling with undue force the board. He was not directed to get the board; he did it of himself. There was no evidence, in my opinion, of any negligence of the defendant; and, even if there was, it was patent and well known to the plaintiff, who voluntarily and with the fullest knowledge of the full extent of the danger, incurred it. The principle as laid down by Bowen, L.J., is clear and conclusive, *viz.*: "Where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence." Apply that principle to the facts of this case as found by the jury. The appellant did not know that the machinery was not reasonably fit for the purpose; a fellow-workman in his presence had complained of the danger of jibbing stones to Rings, who had acted as ganger, and the appellant had complained to the crane-driver, who laughed at him.

My Lords, I have already said that I see no evidence to support the finding that the machinery was not reasonably fit for the purpose, nor of any negligence in its use; but the finding so stands. The appellant may have voluntarily entered on a risky

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business; but he did not voluntarily undertake it plus the risk from defective machinery. There must be an assent to undertake the risk with the full appreciation of its extent. In my opinion, the findings of the jury, in answer to questions 2 and 3, of negligence by the respondents in not supplying means of warning when the stones were being jibbed, do not avail the plaintiff. He undertook a dangerous work of drilling holes, while over his head (unless he moved away) stones were being hauled by a crane. That work he entered upon knowing it was dangerous to that extent. He worked for months, knowing there was no special warner to caution him, but running his chance of getting out of the way, when the crane would otherwise pass over his head. He was, in my opinion, both sciens and volens as to all the danger except that arising from unfit machinery. Of that danger he was not aware. I more than doubt it existed at all; but the right of appeal is a statutable one: the respondents have not brought themselves within the statute, in not objecting at the trial to the want of any evidence to support the first finding; while it stands, the maxim, "*Volenti non fit injuria*," appears inapplicable. How can the plaintiff be held to voluntarily incur a danger from unfit machinery, the unfitness of which he was admittedly not aware of? The case of *Thomas* v. *Quartermaine*[1] for the same reason is no authority for the respondents' contention.

In result, I am of opinion that the appellant is entitled to succeed on the course the case has taken, and with the limited right of review accorded to the Divisional Court, to the Court of Appeal, or to your Lordships' House.

Order of the Court of Appeal reversed and order of the Queen's Bench Division restored: the respondents to pay to the appellant the costs in the Court of Appeal and the costs incurred by him in respect of his appeal to this House, the costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis: cause remitted to the Queen's Bench Division.

[1] 18 Q. B. D., 685.

NOTE.

This case furnishes an illustration of the maxim, *volenti non fit injuria*; no act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it; no man can enforce a right which he has voluntarily waived or abandoned. It may be a question of some nicety, however, whether there has been such assent or waiver. A servant who knowingly works on dangerous premises or with defective plant or tools, is not for that reason *ipso facto* debarred from suing his employer when an accident happens. The question is, not whether he knew of the danger, but whether in fact he agreed to run the risk, in the sense that he exempted his employer from his duty not to create the danger, and agreed to take the chance of an accident. Knowledge of the danger may be evidence of such an agreement, but it is nothing more. To know of a breach of duty is not necessarily to excuse it, whether the agreement really exists is therefore a question of fact for the jury. See *Williams* v. *Birmingham*, (1899) 2 Q. B. 338.

As authority for the general liability of owners and possessors of dangerous premises, see *Indermaur* v. *Dames*, L. R. 1. C. P. 274; 2 C. P. 311. *Francis* v. *Cockerell*, L. R. 5 Q. B. 184, 501. shows how the liability as laid down in the general rule may be increased when there is a warranty of safety; while *Gautret* v. *Egerton*, L. R. 2 C. P. 371, shows how the extent of such liability may be diminished in the case of bare licensees.

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v.

McGREGOR, GOW & CO.

[*Reported in* (*1892*) *A C.*, 25.]

The following judgments were delivered :

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December, 18.

LORD HALSBURY, L. C.—My Lords, notwithstanding the elaborate examination which this case has undergone, both as to fact and law, I believe the facts may be very summarily stated, and when so stated the law seems to me not open to doubt.

An associated body of traders endeavour to get the whole of a limited trade into their own hands by offering exceptional and very favourable terms to customers who will deal exclusively with them ; so favourable that but for the object of keeping the trade to themselves they would not give such terms ; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves.

I do not think that I have omitted a single fact upon which the appellants rely to show that this course of dealing is unlawful and constitutes an indictable conspiracy.

Now it is not denied and cannot be even argued that *prima facie* a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice." This is the language of Baron Alderson in delivering the judgment of the Exchequer Chamber,[1] and no authority, indeed no argument, has been directed to qualify that leading proposition. It is necessary, therefore, for the appellants here to show that what I have described as the course pursued by the associated traders is a "matter contrary to law."

Now, after a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them ; and

[1] *Hilton v. Eckersley*, 6 E. & B., at pp. 74, 75.

if this is unlawful it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful.

There are doubtless to be found phrases, in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals; but when one analyses what is the real meaning of such phrases it is manifest that all that is intended to be implied by them is that any rival trading which shall be started against the association will be rendered unprofitable by the more favourable terms, that is to say, the reduced freights, discounts, and the like which will be given to customers who will exclusively trade with the associated body. And, upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself. If such an injury, and the motive of its infliction, is examined and tested, upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and consequently unlawful, a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness.

The learned counsel who argued the case for the appellants with their usual force and ability, were pressed from time to time by some of your Lordships to point out what act of unlawful obstruction, violence, molestation, of interference was proved against the associated body of traders, and, as I have said, the only wrongful thing upon which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful.

The sending up of ships to Hankow, which in itself, and to the knowledge of the associated traders, would be unprofitable, but was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition, is the

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one fact which appears to be pointed to as out of the ordinary course of trade. My Lords, after all, what can be meant by "out of the ordinary course of trade"? I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

I entirely adopt and make my own what was said by Lord Justice Bowen in the Court below: "All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the Bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law Courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no farther.'"

Excluding all I have excluded upon my view of the facts, it is very difficult indeed to formulate the proposition. What is the wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person is effected? All are free to trade upon what terms they will, and nothing has been done except in rival trading which can be supposed to interfere with the appellants' interests.

I think this question is the first to be determined: What injury, if any, has been done? What legal right has been interfered with? Because if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons. My Lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice's criticism[1] (if its meaning was rightly interpreted, which I very much doubt) on the observations made by my noble and learned friend Lord Bramwell in *Reg.* v. *Druitt*,[2]

[1] 21 Q. B. D., 551.

[2] 10 Cox. C. C., 592.

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if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanour, and I cannot think the Chief Justice meant to throw any doubt upon such a proposition.

But in this case the thing done, the trading by a number of persons together, effects no more and is no more, so to speak, a combined operation than that of a single person. If the thing done is rendered unlawful by combination, the course of trade by a person who singly trades for his own benefit and apart from partnership of sharing profits with others, but nevertheless avails himself of combined action, would be open to the same objections. The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors (if they might be supposed to have knowledge of the transaction) would be acting in combination for the general result, and would, whether for the benefit of the individual, or for an associated body of traders, make it not the less combined action than if the combination were to share profits with independent traders; and if a combination to effect that object would be unlawful, the sharers in the combined action could, in a charge of criminal conspiracy, make no defence that they were captain, agent, or sailors, respectively, if they were knowingly rendering their aid to what, by the hypothesis, would be unlawful if done in combination.

A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word "unlawful" is not uncommonly, though, I think, somewhat inaccurately used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade: and contracts so tainted the law will not lend its aid to enforce.

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It treats them as if they had not been made at all. But the more accurate use of the word "unlawful," which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as *contrary to law*, is not applicable to such contracts.

It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated. A Judge in very early times expressed great indignation at such a contract; and Mr. Justice Crompton undoubtedly did say (in a case where such an observation was wholly unnecessary to the decision, and therefore manifestly obiter) that the parties to a contract in restraint of trade would be indictable. I am unable to assent to that *dictum*. It is opposed to the whole current of authority; it was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle.

In the result, I think that no case whatever is made out of a conspiracy such as the appellants here undertook to establish; and it is not unimportant, for the reasons I have given, to see what is the conspiracy alleged in the statement of claim. The first paragraph alleges the conspiracy to be "to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs." The word "prevent" is sufficiently wide to comprehend both lawful means and unlawful; but as I have already said, in proof there is nothing but the competition with which I have dealt.

The second paragraph alleges that in pursuance of the conspiracy people were "bribed, coerced, and induced to agree to forbear and to ferbear from shipping cargoes by the steamers of the plaintiffs." If the word "bribed" is satisfied by the offering lower freights and larger discounts, then that is proved; but then the word "bribed" is robbed of any legal significance. "Coerced" is not justified by any evidence in the case, and the word "induced" is absolutely neutral, and no unlawful inducement is proved.

The third paragraph uses language such as "intention to injure the plaintiffs," "threats of stopping the shipment of homeward cargoes," and the like. But I ask myself whether if the indictment had set out the facts without using the

ambiguous lauguage to which I have referred in the statement of claim, it would have disclosed an indictable offence? I am very clearly of opinion it would not.

I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade is unlawful, and I am clearly of opinion that it is not.

I think, therefore, that the appeal ought to be dismissed with costs, and I so move your Lordships.

Lord Watson.—My Lords, at the hearing of this appeal in April last, your Lordships had the benefit of listening to a learned and exhaustive discussion of the law applicable to combination or conspiracy. It appeared to me at the time, and further consideration has confirmed my impression, that much of the legal argument addressed to us had a very distant relation to the circumstances of the present case, which are simple enough. The evidence, oral and documentary, contains an unusual amount of figurative language, indicating a wide difference of opinion as to the legal aspect of the facts, but presents no conflict in regard to the facts themselves.

The respondents are firms and companies owning steam-vessels which ply regularly, during the whole year, some of them on the Great River of China between Hankow and Shanghai, and others between Shanghai and European ports. During the tea season, which begins in May and lasts for about six weeks, most shippers prefer to have their tea sent direct from Hankow to Europe; but it suits the respondents' trade better to have the tea which they carry brought down to Shanghai by their ordinary river service, and then transhipped for Europe. Accordingly they do not send their ocean steamers up the river, except when they find it necessary in order to intercept cargoes which might otherwise have been shipped from Hankow in other than their vessels.

The appellants are also a ship-owning company. They do not maintain a regular service either on the Great River or between Europe and Hankow; but they send vessels to Hankow

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during the tea season, with the legitimate object of sharing in the profits of the tea-carrying trade, which appear, in ordinary circumstances, to have been considerable.

The respondents entered into an agreement, the avowed purpose of which was to secure for themselves as much of the tea shipped from Hankow as their vessels could conveniently carry, which was practically the whole of it, and to prevent the appellants and other outsiders from obtaining a share of the trade. The consequence of their acting upon the agreement was that the appellants, having sent their ships to Hankow, were unable to obtain cargoes at remunerative rates; and they claim as damages due to them by the respondents, the difference between their actual earnings and the freights which their vessels might have earned had it not been for the combined action of the respondents. As the law is now settled, I apprehend that in order to substantiate their claim, the appellants must shew, either that the object of the agreement was unlawful, or that illegal methods were resorted to in its prosecution. If neither the end contemplated by the agreement, nor the means used for its attainment were countrary to law, the loss suffered by the appellants was *damnum sine injuria*.

The agreement of which the appellants complain left the contracting parties free to recede from it at their pleasure, and is not obnoxious to the rule of public policy, which was recognised, in *Hilton* v. *Eckersley*.[1] The decision in that case, which was the result of judicial opinions not altogether reconcilable, appears to me to carry the rule no further than this—that an agreement by traders to combine for a lawful purpose, and for a specified time, is not binding upon any of the parties to it if he chooses to withdraw, and consequently cannot be enforced *in invitum*. In my opinion it is not an authority for the proposition that an outsider can plead the illegality of such a contract, whilst the parties are willing to act, and continue to act upon it. I venture to think that the decision of this appeal depends upon more tangible considerations than any which could be derived from the study of what is generally known as public policy.

There is nothing in the evidence to suggest that the parties to the agreement had any other object in view than that of

[1] 6 E. & B., 47.

defending their carrying trade during the tea season against the encroachments of the appellants and other competitors, and of attracting to themselves custom which might otherwise have been carried off by those competitors. That is an object which is strenuously pursued by merchants great and small in every branch of commerce ; and it is, in the eye of the law, perfectly legitimate. If the respondents' combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships. But no such case is presented by the facts disclosed in this appeal.

The object of the combination being legal, was any illegal act committed by the respondents in giving effect to it ? The appellants invited your Lordships to answer that question in the affirmative, on the ground that the respondents' competition was unfair, by which they no doubt meant that it was tainted by illegality. The fact which they mainly relied on were these: that the respondents allowed a discount of 5 *per cent.* upon their freight accounts for the year to all customers who shipped no tea to Europe except by their vessels ; that, whenever the appellants sent a ship to load tea at Hankow, the respondents sent one or more of their ocean steamers to under-bid her, so that neither vessel could obtain cargo on remunerative terms ; and lastly, that the respondents took away the agency of their vessels from persons who also acted as shipping agents for the appellants and other trade competitors outside the combination.

I cannot for a moment suppose that it is the proper function of English Courts of Law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages. Until that becomes the law of the land, it is, in my opinion, idle to suggest that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment. The withdrawal of agency at first appeared to me to be a matter attended with difficulty ; but on consideration, I am satisfied that it cannot be regarded as an illegal act. In the first place, it was impossible

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that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and, in the second place, the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage.

My Lords, in this case it has not been proved, and it has not been suggested, that the respondents used either misrepresentation or compulsion for the purpose of attaining the object of their combination. The only means by which they endeavoured to obtain shipments for their vessels, to the exclusion of others, was the inducement of cheaper rates of freight than the appellants were willing to accept. I entertain no doubt that the judgment appealed from ought to be affirmed. I am quite satisfied with the reasons assigned for it by Bowen and Fry, L. JJ.; and the observations which I have made were not meant to add to these reasons, but to make it clear that in my opinion the appellants have presented for decision no question of fact or law attended with either doubt or difficulty.

Lord Macnaghten.—My Lords, the judgment which I am about to read is the judgment of noble and learned friend Lord Bramwell, who is unable to be present here this morning and has asked me to read it for him.

Lord Bramwell.—My Lords, the plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them. The plaintiffs admit that materially and morally they have been at liberty to do their best for themselves without any impediment by the defendants. But they say that the defendants have entered into an agreement in restraint of trade; an agreement, therefore, unlawful; an agreement, therefore, indictable, punishable; that the defendants have acted in conformity with that unlawful agreement, and thereby caused damage to the plaintiffs in respect of which they are entitled to bring, and bring this action.

The plaintiffs have proved an agreement among the defendants, the object of which was to prevent shipowners, other than

themselves, from trading to Shanghai and Hankow. The way in which that was to be accomplished was by giving benefits to those who shipped exclusively by them, by sending vessels to compete with the plaintiffs', and by lowering their, the defendants', rates of freight so that the plaintiffs had to lower theirs, to their great loss. There are other matters alleged, but they are accessorial to the above, which is the substance of the complaint.

The plaintiffs also say that these things, or some of them, if done by an individual, would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure; so that if actionable when done by one, much more are they when done by several, and if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons, that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two; one is, that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes: *de minimis non curat lex*; while if done by several it is sufficiently important to be treated as a crime. Let it be, then, that it is no answer to the plaintiffs' complaint that if what they complain of had been done by an individual there would be no cause of action. There is the further question whether there is a cause of action, the acts being done by several.

The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and therefore against public policy, and so illegal. "Public policy," said Burrough, J. (I believe, quoting Hobart, C.J.), "is an unruly horse, and dangerous to ride."[1] I quote also another distinguished Judge, more modern, Cave, J.: "Certain kinds of contracts have been held void at Common Law on the ground of

[1] *Richardson* v. *Mellish*, 2 Bing., at p. 252.

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public policy ; a branch of the law, however, which certainly should not be extended, as Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." [1] I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy, and void. How can the Judge do that without any evidence as to its effect and consequences ? If the shipping in this case was sufficient for the trade, a further supply would have been a waste. There are some people who think that the public is not concerned with this—people who would make a second railway by the side of one existing, saying "only the two companies will suffer," as though the wealth of the community was not made up of the wealth of the individuals who compose it. I am by no means sure that the conference did not prevent a waste, and was not good for the public. Lord Coleridge thought it was—see his judgment.

As to the suggestion that the Chinese profited by the lowering of freights, I cannot say it was not so. There may have been a monopoly or other cause to give them a benefit ; but, as a rule, it is clear that the expense of transit, and all other expenses, borne by an exported article *that has a market price*, are borne by the importer, therefore, ultimately, by the consumer. So that low freights benefit him. To go on with the case, take it that the defendants had bound themselves to each other ; I think they had, though they might withdraw. Let it be that each member had tied his hands ; let it be that that was in restraint of trade ; I think upon the authority of *Hilton* v. *Eckersley* and other cases, we should hold that the agreement was illegal, that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground they must make out that it was an offence, a crime, a misdemeanour. I am clearly of opinion it was not. Save the opinion of Crompton, J., (entitled to the greatest respect, but not assented to by Lord

[1] [1891] 1. Q. B., 595.
[2] 6 E. & B., 47.

Campbell or the Exchequer Chamber), there is no authority for it in the English law.

It is quite certain that an agreement may be void, yet the parties to it not punishable. Take the case I put during the argument: a man and woman agree to live together as man and wife, without marrying. The agreement is illegal, and could not be enforced, but clearly the parties to it would not be indictable. It ought to be enough to say that the fact that there is no case where there has been a conviction for such an offence as is alleged against the defendants is conclusive.

It is to be remembered that it is for the plaintiffs to make out the case that the defendants have committed an indictable offence, not for the defendants to disprove it. There needs no argument to prove the negative. There are some observations to be made. It is admitted that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of "fair competition"? What is unfair that is neither forcible nor fraudulent? It does seem strange that to enforce *freedom* of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection.

There is one thing that is to me decisive. I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law; perhaps not enforceable *inter se*, but not indictable. The Legislature has now so declared. The enactment is express, that agreements among workmen shall be binding, whether they would or would not, but for the Acts, have been deemed unlawful, as in restraint of trade. Is it supposable that it would have done so in the way it has, had the workmen's combination been a punishable misdemeanour? Impossible. This seems to me conclusive, that though agreements which fetter the freedom of action in the parties to it may not be enforceable, they are not indictable. See also the judgment of Fry, L.J., on this point. Where is such a contention to stop? Suppose the case put in the argument: In a small town there are two shops, sufficient for the wants of the neighbourhood, making only a reasonable profit. They are threatened with a third. The two shopkeepers agree to warn the intending

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shopkeeper that if he comes they will lower prices, and can afford it longer than he. Have they committed an indictable offence? Remember the conspiracy is the offence, and they have conspired. If he, being warned, does not set up his shop, has he a cause of action? He might prove damages. He might shew that from his skill he would have beaten one or both of the others. See in this case the judgment of Lord Esher, that the plaintiffs might recover for "damages at large for future years." Would a shipowner who had intended to send his ship to Shanghai, but desisted owing to the defendants' agreement, and on being told by them they would deal with him as they had with the plaintiffs, be entitled to maintain an action against the defendants? Why not? If yes, why not every shipowner who could say he had a ship fit for the trade, but was deterred from using it?

The Master of the Rolls cites Sir William Erle, that "a combination to violate a private right in which the public has a sufficient interest is a crime, such violation being an actionable wrong." True. Sir William Erle means that where the violation of a private right is an actionable wrong, a combination to violate it, if the public has a sufficient interest, is a crime. But in this case, I hold that there is no private right violated. His Lordship further says: "If one goes beyond the exercise of the course of trade, and does an act beyond what is the course of trade, in order—that is to say, with intent—to molest the other's free course of trade, he is not exercising his own freedom of a course of trade, he is not acting in but beyond the course of trade, and then it follows that his act is an unlawful obstruction of the other's right to a free course of trade, and if such obstruction causes damage to the other he is entitled to maintain an action for the wrong."[1] I may be permitted to say that this is not very plain. I think it means that it is not in the course of trade for one trader to do acts the motive of which is to damage the trade of another. Whether I should agree depends on the meaning to be put on "course of trade" and "molest." But it is clear that the Master of the Rolls means conduct which would give a cause of action against an individual. He cites Sir William Erle in

[1] 23 Q. B. D., 607.

support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here. The Master of the Rolls says the lowering of the freight far beyond a lowering for any purpose of trade was not an act done in the exercise of their own free right of trade, but for the purpose of interfering with the plaintiffs' right to a free course of trade; therefore a wrongful act as against the plaintiffs' right; and as injury to the plaintiffs followed, they had a right of action. I cannot agree. If there were two shopkeepers in a village and one sold an article at cost price, not for profit therefore, but to attract customers or cause his rival to leave off selling the article only, it could not be said he was liable to an action. I cannot think that the defendants did more than they had a legal right to do. I adopt the vigorous language and opinion of Fry, L. J.: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts." [1] It is a strong thing for the plaintiffs to complain of the very practices they wished to share in, and once did.

I am of opinion that the judgment should be affirmed.

Lord Macnaghten.—My Lords, for myself I agree entirely in the motion which has been proposed, and in the reasons assigned for it in the judgments which have been delivered and in those which are yet to be delivered; and I do not think I can usefully add anything of my own.

Lord Morris.—My Lords, the facts of this case demonstrate that the defendants had no other, or further, object than to appropriate the trade of the plaintiffs. The means used were: *firstly*, a rebate to those who dealt exclusively with them; *secondly*, the sending of ships to compete with the plaintiffs' ships; *thirdly*, the lowering of the freights; *fourthly*, the indemnifying other vessels that would compete with the plaintiffs'; *fifthly*, the dismissal of agents who were acting for them and the plaintiffs.

The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons. Of the first four of the means used by

[1] 23 Q. B. D., 625, 626.

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the defendants, the rebate to customers and the lowering of the freights are the same in principle, being a bonus by the defendants to customers to come and deal exclusively with them. The sending of ships to compete, and the indemnifying other ships, was "the competition" entered on by the defendants with the plaintiffs. The fifth means used, *viz.*, the dismissal of agents, might be questionable according to the circumstances; but in the present case, the agents filled an irreconcilable position in being agents for the two rivals, the plaintiffs and the defendants. Dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade.

All the acts done, and the means used, by the defendants were acts of competition for the trade. There was nothing in the defendants' acts to disturb any existing contract of the plaintiffs, or to induce any one to break such. Their action was aimed at making it unlikely that any one would enter into contracts with the plaintiffs, the defendants offering such competitive inducements as would probably prevent them. The use of a rhetorical phrase in the correspondence cannot affect the real substance and meaning of it.

Again, what one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. I entertain no doubt that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure the trade of competitors, provided they do no more than is incident to such motive object and use no unlawful means. And the defendants' case clearly comes within the principle I have stated.

Now, as to the contention that the combination was in restraint of trade, and therefore illegal. In the first place, was it in restraint of trade? It was a voluntary combination. It was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was, in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise.

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I cannot see why Judges should be considered especially gifted with prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called "fair" intermediate between lawful and unlawful. The question of "fairness" would be relegated to the idiosyncrasies of individual Judges. I can see no limit to competition, except that you shall not invade the rights of another.

But suppose the combination in this case was such as might be held to be in restraint of trade, what follows? It could not be enforced. None of the parties to it could sue each other. It might be held void, because its tendency might be held to be against the public interests. Does that make, *per se*, the combination illegal? What a fallacy would it be that what is void and not enforceable becomes a crime; and cases abound of agreements which the law would not enforce, but which are not illegal; which you may enter into, if you like, but which you will not get any assistance to enforce.

My Lords, I have merely summarised my views, because I adopt entirely the principles laid down by Lord Justice Bowen in his judgment with such felicitous illustrations, and I concur in the opinion already announced by your Lordships, that the judgment of the Court of Appeal should be affirmed.

Lord Field.—My Lords, I think that this appeal may be decided upon the principles laid down by Holt, C. J., as far back as the case of *Keable* v. *Hickeringill*, cited for the appellants.[1] In that case the plaintiff complained of the disturbance of his "decoy" by the defendant having discharged guns near to it and so driven away the wild fowl, with the intention and effect of the consequent injury to his trade. Upon the trial a verdict passed for the plaintiff, but in arrest of judgment it was alleged that the declaration did not disclose any cause of action. Holt, C. J., however, held that the action, although new in instance, was not new in reason or principle, and well lay, for he said that the use of a "decoy" was a lawful trade, and that he who hinders another in his trade or livelihood is

[1] 11 Mod., 74, 131, and note to *Karrington* v. *Taylor*, 11 East, 574.

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liable to an action if the injury is caused by "a violent or malicious act"; suppose "for instance," he said, "the defendant had shot in his own ground, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong." But, he added, if the defendant "using the same employment as the plaintiff," had set up another decoy so near as to spoil the plaintiff's custom no action would lie, because the defendant had "as much liberty to make and use a decoy" as the plaintiff. In support of this view he referred to earlier authorities. In one of them it had been held that for the setting up of a new school to the damage of an ancient one by alluring the scholars no action would lie, although it would have been otherwise if the scholars had been driven away by violence or threats.

It follows therefore from this authority, and is undoubted law, not only that it is not every act causing damage to another in his trade, nor even every intentional act of such damage, which is actionable, but also that acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action.

Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights. No doubt, also, there have been cases in which agreements to do acts injurious to others have been held to be indictable as amounting to conspiracy, the ultimate object or the means being unlawful, although if done by an individual no such consequence would have followed, but I think that in all such cases it will be found that there existed either an ultimate object of malice, or wrong, or wrongful means of execution involving elements of injury to the public, or, at least, negativing the persuit of a lawful object.

Now, applying these principles to the case before your Lordships, it appears upon the evidence that the appellants and respondents are shipowners, and have for many years been, engaged, sometimes in alliance, at other times in the competition, in the carrying trade of the eastern seas to and from

Europe and elsewhere. A very important portion of this trade consists of a large amount of freight to be earned at the ports of Hankow and Shanghai during the season by carrying to Europe the teas brought there for shipment, and it was of the respondents' action in that business during the season of 1885 that the appellants complain. They do not allege that the respondents have been guilty of any act of fraud or violence, or of any physical obstruction to the appellants' business, or have acted from any personal malice or ill-will, but they say that the respondents acted with the calculated intention and purpose of driving the appellants out of the Hankow season carrying trade by a course of conduct which, although not amounting to violence, was equally effective, and so being in fact productive of injury to them was wrongful and presumably malicious.

It appeared upon the evidence that both parties have been for some years trading in competition at Hankow for tea freights, which amounted to a very considerable sum, and the earning of which was spread over a short annual season. The trade was carried on by a large number of independent shipowners, and the tonnage which was employed may be roughly divided into two classes :—*First*, tonnage engaged in regular lines to and from ports in the China and Japan seas all the year through, loading both outwards and inwards ; and *secondly*, tonnage loading generally outwards to ports in Australia or elsewhere, and only seeking freights and taking up "homeward" berths at Hankow during the short period when freights are abundant there and scarce elsewhere. The several respondents and the "Messageries Maritimes" of France represent substantially the first class of shipowners. The appellants and other shipowners, who are no parties to this record, but some of whom were in alliance with the appellants, in the same interest, forming a very influential class of traders, may be taken to represent the second.

The two ports of Hankow and Shanghai are the centres of these competing interests, and it is hardly necessary to add that the competition was very severe, and the accumulation of tonnage for "homeward" freights produced by the circulation of an excessive number of ships rendered rates so unremunerative

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that in each of the years, 1879, 1883, and 1885, a combination of shipowners, known as a "conference," was formed, consisting in the main of the first class of owners, with the object of limiting the amount of tonnage to be sent up the river, and thus securing enhancement and regularity of rates.

That the parties to these agreements did not suppose that they were doing anything violent or malicious, or were parties to a conspiracy, rendering themselves liable to action or indictment, is clear from the fact that in 1879 Messrs. Gellatly & Co., who then owned the ships of which the appellants are now the owners, and in 1884 the appellants (whose managers Messrs. Gellatly were and are) were parties to them, and in 1885 desired to become so, and only brought their present action because the other parties to the conference of that year refused to extend its provisions to them and others in the same commercial position.

The grounds upon which this refusal was based by the respondents were purely of a commercial and in no way of a personal character. They said that in forming what they considered as the regular China and Japan trade out and home they supplied the trade with tonnage in season and out of season, and that it was hard upon them that at times when cargo necessary for their requirements, in order to fill the space required for outward shipments, and to make their adventure remunerative, was to be obtained, that cargo should be absorbed by vessels that only entered the trade when trade homewards was slack elsewhere.

It is absolutely unnecessary to consider whether these grounds were morally or commercially justifiable. They were not unlawful, and they were of a nature legitimately, if not necessarily, to be taken into account in carrying on the respondents' business with profit. Indeed, the question between the parties at that time was not whether such combination should exist or not, but where the line should be drawn. It was in this state of things that the season of 1885 opened.

Under the conference agreement of 1884 it had been agreed between the conference owners and the appellants that the latter should load homewards from Hankow for that season two of their Australian outward-going ships upon conference terms and rates; and when in the latter part of 1884 negotiations

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were set on foot for the establishment of a conference in 1885 the appellants were desirous of at least retaining the same position in future. They therefore requested Mr. Holt, one of the respondents, an influential member of the conference and personal friend of Mr. Gellatly, to bring the matter before them. In the meanwhile the effect of unrestricted competition had been such as to produce what was termed "a collapse of freights," with the result that negotiations for a new conference ended in an agreement to that effect, bearing date the 7th of April, the terms of which were in most, if not in all important respects, similar to the agreement of 1884.

The first object of the parties to this agreement was to limit as between themselves the number of ships, and it therefore provided that if no other ships than those of the conference owners went, no more than six conference ships should go up the river to Hankow; but then in order to meet the threatened competition of the appellants and others it was provided that if "outsiders" started additional steamers should meet them, such conference steamers to be limited in number "as much as was consistent with effective opposition." Principles were also laid down for rates of freights and distribution of cargo and freights among conference owners, and in order to induce shippers to ship with them exclusively it was provided that returns should be made upon the same terms as previously arranged by the agreement of 1884 (to which the appellants had been parties) to all exporters who should confine their shipments to conference ships.

Whilst the negotiations for this agreement were pending, Mr. Gellatly, a large share-holder in the appellant company, in company with Mr. Thompson, a shipowner with large tonnage at command, who was also desirous of becoming a member of the conference, had both correspondence and interviews with several of the conference owners, in which they claimed to be admitted to the terms of it, but the latter persistently objected upon the ground that I have before stated, and in the result Mr. Gellatly and Mr. Thompson declared that their vessels should certainly go up to Hankow the ensuing season, as, no matter what the rates were, they thought (as indeed appears to have been the result), that the loss to the conference would be greater than to them.

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No agreement could therefore be come to between the two parties, and in the result the appellants and Mr. Thompson placed ships of very considerable tonnage, which had made their outward voyage to Australian ports, upon the Hankow berth, and the respondents sent up the additional ships provided for by the conference agreement, not only to compete with the appellants' and Mr. Thompson's ships, but also to deter others from following.

On the 11th of May the respondents also sent out a circular to shippers, referring to a similar circular issued under the conference agreement of 1884, by which they reminded those to whom it was sent that shipments for London by the SS. Pathan and Afgan (two of the appellants' ships) and the Aberdeen (Mr. Thompson's), or by other non-conference steamers, at any of the ports in China or at Hongkong, would exclude those making such shipments from participation in the returns to shippers.

The competition thus created was persisted in during the whole first tea season, each party procuring or endeavouring to procure, freights, and circulating their ships at reduced rates, with the result that the three opposing ships of the appellants and Mr. Thompson, the Pathan, the Afgan, and the Aberdeen, loaded full cargoes home at very low rates, and many of the conference ships had to go away empty.

It was under these circumstances that the appellants brought the present action, in which they in substance complain, *first*, of the return of 5 *per cent.* to the shippers who have not shipped with the appellants, and of the circular to that effect; *secondly*, of the placing upon the berths of extra ships in order to meet the appellants and other vessels; and *thirdly*, the reduction of freights to an unremunerative extent with the object of securing cargo. I fail, however, to see that any of those things are sufficient to support this action. Everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was *bonâ fide* so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any

legitimate cause, and is therefore presumably due to nothing but its obvious object of harm. All the acts complained of were in themselves lawful, and if they caused loss to the appellants, that was one of the necessary results of competition.

It remains to consider the further contention of the appellants that these acts of the respondents, even if lawful in themselves if done by an individual, are illegal and give rise to an action as having been done in the execution of the conference agreement, which is said to amount to a conspiracy, as being in restraint of trade, and so against public policy, and illegal; but this contention, I think, also fails. I cannot say upon the evidence that the agreement in question was calculated to have or had any such result, nor, even if it had, has any authority (except one, no doubt entitled to great weight, but which has not met with general approval) been cited to shew that such an agreement even if void is illegal, nor any that, even if it be so, any action lies by an individual.

For these, and the other reasons given by the learned Lords Justices Bowen and Fry, and which I need not recapitulate, I think that the appeal fails, and ought to be dismissed.

Lord Hannen.—My Lords, it is not necessary that I should recapitulate the facts of this case; they have been fully stated in the opinions which have been already delivered. The charge against the defendants is that they conspired together to prevent the plaintiffs from obtaining cargoes for their ships by bribing, coercing, and inducing shippers to forbear from shipping cargoes by the plaintiffs' steamers; and it is further complained that the defendants, with intent to injure the plaintiffs, agreed to refuse, and refused to accept cargoes, except upon the terms that the shippers should not ship any cargoes by the plaintiff's steamers.

The means by which these alleged objects were sought to be attained were: (1) Offering to shippers and their agents a rebate of 5 *per cent.* on the agreed freights, to be made to those who, during a fixed period, shipped only by the defendants' steamers. (2) Sending steamers to Hankow to compete with the steamers of persons not members of the defendants' conference or combination, so as to drive them from the trade of that place. (3) Removing from the agency of defendants' steamers those persons who acted in the interest of non-conference steamers.

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It was contended that the agreement between the defendants to act in combination which was proved to exist, was illegal as being in restraint of trade. I think that it was so, in the sense that it was void, and could not have been enforced against any of the defendants who might have violated it: *Hilton* v. *Eckersley*.[1] But it does not follow that the entering into such an agreement would, as contended, subject the persons doing so to an indictment for conspiracy, and I think that the opinion to that effect expressed by Crompton, J., in *Hilton* v. *Eckersley*[1] is erroneous.

The question, however, raised for our consideration in this case is whether a person who has suffered loss in his business by the joint action of those who have entered into such an agreement, can recover damages from them for the injury so sustained. In considering this question it is necessary to determine upon the evidence what was the object of the agreement between the defendants and what were the means by which they sought to attain that object. It appears to me that their object was to secure to themselves the benefit of the carrying trade from certain ports. It cannot, I think, be reasonably suggested that this is unlawful in any sense of the word. The object of every trader is to procure for himself as large a share of the trade he is engaged in as he can. If then the object of the defendants was legitimate, were the means adopted by them open to objection? I cannot see that they were. They sought to induce shippers to employ them rather than the plaintiffs by offering to such shippers as should during a fixed period deal exclusively with them the advantage of a rebate upon the freights they had paid. This is, in effect, nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals.

With regard to the sending of ships to Hankow to compete with the plaintiffs' ships, that appears to have been done in order that the defendants' customers might have the opportunity of sending their goods without forfeiting their right to a rebate. No obstruction was offered by these ships to the ships of non-conference owners, and by their presence at Hankow

[1] 6 E. & B., 47.

shippers were left simply to determine whether it was to their pecuniary interest to ship by the defendants' vessels or by others. The removing from the agency of the defendants' vessels those persons who acted in the interest of non-conference steamers, appears to me a legitimate mode of securing agents whose exertions would be exclusively devoted to the furtherance of the defendants' trade.

I arrive at the conclusion, therefore, that the objects sought and the means used by the defendants did not exceed the limits of allowable trade competition, and I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself.

I consider that a different case would have arisen if the evidence had shewn that the object of the defendants was a malicious one, namely, to injure the plaintiffs whether they, the defendants, should be benefited or not. This is a question on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves.

It only remains for me to refer to the argument that an act which might be lawful for one to do, becomes criminal, or the subject of civil action by any one injured by it, if done by several combining together. On this point I think the law is accurately stated by Sir William Erle in his treatise on the law relating to Trades Unions. The principle he lays down is equally applicable to combinations other than those of Trades Unions. He says (page 23): "As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms which one person may exercise and declare singly, many, after consultation, may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms, but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination."

1891.

Mogul Steamship Company v. McGregor Gow & Co.

In considering the question, however, of what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining, the fact of several agreeing to a common course of action may be important. There are some forms of injury which can only be effected by the combination of many. Thus, if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual. But it appears to me that, in the present case, there is nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals, the plaintiffs, were willing to offer.

For these reasons I think that the judgment of the Court of Appeal should be affirmed.

Order of Lord Coleridge, C. J., and order of the Court of Appeal affirmed, and appeal dismissed with costs.

NOTE.

This case may be treated as an illustration of an exception to the general rule laid down in *Quinn* v. *Leathem*, see *post*. Intimidation which is *primâ facie* unlawful within the general rule may be the subject of special justification applicable to the particular class of cases. No general rule can be formulated to embrace all these exceptions, but it may be stated that it is a sufficient justification that the act complained of was one done in the just and reasonable defence of one's own rights and interests.

In the leading case the plaintiff alleged that the defendants who were an associated body of traders in China tea had wilfully caused loss to him, a rival trader, by compelling certain merchants in China to cease to act as his agents, by means of a threat that if they continued to do so, the agency of the defendant association would be withdrawn from them. The House of Lords held that there was no cause of action and the act complained of was a justifiable measure of self-protection.

See however Bigelow on Torts, 8th Edition, p. 240, where it is pointed out that the line is very difficult to draw, as the principle if carried far enough would favour the creation of monopolies.

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[*Reported in* (1901) *A. C., 495.*]

The following judgments of their Lordships were delivered:

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August, 5.

Earl of Halsbury, L. C.—My Lords, in this case the plaintiff has by a properly framed statement of claim complained of the defendants, and proved to the satisfaction of a jury that the defendants have wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff, that the defendants did this in pursuance of a conspiracy framed among them, that in pursuance of the same conspiracy they induced the servants of the plaintiff not to continue in the plaintiff's employment, and that all this was done with malice in order to injure the plaintiff, and that it did injure the plaintiff. If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community, nor indeed do I understand that any one has doubted that, before the decision in *Allen* v. *Flood* [1] in this House, such fact would have established a cause of action against the defendants. Now, before discussing the case of *Allen* v. *Flood* [1] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision of the case of *Allen* v. *Flood*.[1]

[1] (1898) A. C., 1.

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Now, the hypothesis of fact upon which *Allen* v. *Flood* [1] was decided by a majority in this House was that the defendant there neither uttered nor carried into effect any threat at all: he simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade union official had no authority himself to call out the men, which in that case was argued to be the threat which coerced the employers to discharge the plaintiff. It was further an element in the decision that there was no case of conspiracy or even combination. What was alleged to be done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favour of his fellow members. It is true that I personally did not believe that was the true view of the facts, but, as I have said, we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision. My Lords, in my view what has been said already is enough to decide this case without going further into the facts of *Allen* v. *Flood* [1]; but I cannot forbear accepting with cordiality the statement of them prepared by two of your Lordships, Lord Brampton and Lord Lindley, with so much care and precision.

Now, in this case it cannot be denied that if the verdict stands there was conspiracy, threats, and threats carried into execution, so that loss of business and interference with the plaintiff's legal rights are abundantly proved, and I do not understand the very learned Judge who dissented to have doubted any one of these propositions, but his view was grounded on the belief that *Allen* v. *Flood* [1] had altered the law in these respects, and made that lawful which would have clearly been actionable before the decision of that case. My Lords, for the reasons I have given I cannot agree with that conclusion. I do not deny that if some of the observations made in that case were to be pushed to their logical conclusion it would be very difficult to resist the Chief Baron's inflexible logic; but, with all the respect which any view of that learned Judge is entitled to command and which I unfeignedly entertain, I cannot concur. This case is distinguished in its facts from those which were the essentially

[1] (1898) A.C., 1.

important facts in *Allen* v. *Flood*.[1] Rightly or wrongly, the theory upon which judgment was pronounced in that case is one whereby the present is shewn to be one which the majority of your Lordships would have held to be a case of actionable injury inflicted without any excuse whatever.

My Lords, there was a subordinate question raised which I must not pass over. It is suggested that FitzGibbon, L. J., did not put all the questions which were necessary to raise all the points which the learned counsel desired to argue. Now, I think the charge of the Lord Justice was absolutely accurate, and when in deference to the wishes of the learned counsel for the defendant himself, he consented to put such questions as were then desired, it would be intolerable that it should afterwards be made the subject of complaint that he did not at the same time put other questions which he was not asked to put at all.

My Lords, for these reasons I am of opinion that there is no difficulty whatever in this case, and I move that this appeal be dismissed with costs.

Lord Macnaghten.[2]—My Lords, notwithstanding the strong language of the late O'Brien, J., and the arguments of the Lord Chief Baron, I cannot help thinking that the case of *Allen* v. *Flood* [1] has very little to do with the question now under consideration. In my opinion, *Allen* v. *Flood* [1] laid down no new law. It simply brushed aside certain *dicta* which in the opinion of the majority of this House were contrary to principle and unsupported by authority. Those *dicta* are first to be found in the judgment delivered by Lord Esher on behalf of himself and Lord Selborne in *Bowen* v. *Hall*.[3] They were repeated by Lord Esher and Lopes, L. J., in *Temperton* v. *Russell* [4]; but they were not, I think, necessary for the decision in either case. They did form the ground of decision in *Allen* v. *Flood* [1] in its earlier stages. But in the end the law was restored to the condition in which it was before Lord Esher's views in *Bowen* v. *Hall* [3] and *Temperton* v. *Russell* [4] were accepted by the Court of Appeal. The head-note to *Allen* v. *Flood* [1] might well have run in words used by Parke B. in giving the judgment of an exceptionally strong Court, nearly half a century ago (*Stevenson* v. *Newnham* [5])

[1] (1898) A. C., 1.

[2] Read by Lord Brampton in Lord Macnaghten's absence.

[3] 6 Q. B. D., 333. [4] (1893) 1 Q. B., 715. [5] (1853) 13 C. B., 297.

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—"*an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.*" That, in my opinion, is the sum and substance of *Allen* v. *Flood*.[1] if you eliminate all matters of merely passing interest—the charge of the learned Judge, the findings of the jury (unintelligible, I think, without a careful examination of the evidence), and the discussion of the evidence itself in the two different aspects in which it was presented—once for the consideration of this House, and again for the consideration of the learned Judges by whom the House was assisted.

The case really brought under review on this appeal is *Temperton* v. *Russell*.[2] I cannot distinguish that case from the present. The facts are in substance identical: the grounds of decision must be the same. Now, the decision in *Temperton* v. *Russell*[2] was not overruled in *Allen* v. *Flood*,[1] nor is the authority of *Temperton* v. *Russell*,[2] in my opinion, shaken in the least by the decision in *Allen* v. *Flood*.[1] Disembarrassed of the expressions which Lord Esher unfortunately used, the judgment in *Temperton* v. *Russell*[2] seems to me to stand on surer ground. So far from being impugned in *Allen* v. *Flood*[1] it had, I think, the approval of Lord Watson, whose opinion seems to me to represent the views of the majority better far than any other single judgment delivered in the case. Lord Watson says[3] that he did not think it necessary to notice at length *Temperton* v. *Russell*,[2] because it was to his mind "very doubtful whether in that case there was any question before the Court with regard to the effect of the *animus* of the actor in making that unlawful which would otherwise have been lawful." Then he goes on to say: "The only findings of the jury which the Court had to consider were—(1) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2) that the defendants had maliciously conspired to induce and had thereby induced certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley* v. *Gye*.[4] According to the second finding the persons induced merely refused to make contracts, which was not a legal

[1] (1898) A. C., 1.
[2] (1893) 1 Q. B., 715.
[3] (1898) A. C., 108.
[4] 2 E. & B., 216.

wrong on their part, but the defendants who induced were found to have accomplished their object to the injury of the plaintiffs by means of unlawful conspiracy—a clear ground of liability according to *Lumley* v. *Gye* [1] if, as the Court held, there was evidence to prove it." It must be admitted, I think, that the second reference to *Lumley* v. *Gye* [1] in the passage I have just quoted is a slip—a rare occurrence in a judgment of Lord Watson's. But I do not think that the slip (if it be a slip) impairs the effect of what Lord Watson said. Obviously Lord Watson was convinced in his own mind that a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong.

Precisely the same questions arise in this case as arose in *Temperton* v. *Russell*.[2] The answers, I think, must depend on precisely the same considerations. Was *Lumley* v. *Gye* [1] rightly decided? I think it was. *Lumley* v. *Gye* [1] was much considered in *Allen* v. *Flood*.[3] But as it was directly in question, some of your Lordships thought it better to suspend their judgment. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with the contractual relations recognised by law if there be no sufficient justifications for the interference.

The only other question is this: Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. *Gregory* v. *Duke of Brunswick* [4] is one authority, and there are others. There are valuable observations on the subject in Erle J.'s charge to the Jury in *Duffield's case* [5] and *Rowland's case*.[6] Those were cases

[1] 2 E. & B., 216.
[2] (1893) 1 Q. B., 715.
[3] (1898) A. C., 1.
[4] 6 M. & G., 205, 953
[5] (1851) 5 Cox C. C. 404.
[6] (1851) 5 Cox C. C. 436.

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of trade union outrages; but the observations to which I refer are not confined to cases depending on exploded doctrines in regard to restraint of trade. There are also weighty observations to be found in the charge delivered by Lord FitzGerald, then FitzGerald, J., in *Reg* v. *Parnell and others*.[1] That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of Bowen, L. J., and Lords Bramwell and Hannen in *Mogul Case*.[2] A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord FitzGerald observes) when one man has to defend himself against many combined to do him wrong.

I have only to add that I agree generally with the judgments delivered in the Courts below, and particularly with the judgment of Andrews, J., in the Queen's Bench, and the judgment of Holmes, L. J., in the Court of Appeal. I do not think that the acts done by the defendants were done "in contemplation or furtherance of a trade dispute between employers and workmen." So far as I can see, there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay their fines and entrance moneys. What he objected to was a cruel punishment proposed to be inflicted on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants who were not members of the union.

I also think that the provision in the Conspiracy and Protection of Property Act, 1875, which says that in certain cases an agreement or combination is not to be "indictable as a conspiracy," has nothing to do with civil remedies.

Lord Shand.[3]—My Lords, after the able and full opinions of the learned Judges of the Court of Appeal in Ireland holding

[1] (1881) 14 Cox C. C., 508.

[2] 23 Q. B. D., 598; (1892) A. C., 25.

[3] Read by Lord Davey in Lord Shand's absence.

that the verdict and judgment for the plaintiff ought to stand, the grounds of my opinion that the judgment ought to be affirmed and the appeal dismissed may be shortly stated. I refrain from any detailed reference to the numerous cases cited in the argument. These have been considered and discussed by the Judges of the Court of Appeal, and I concur in the reasoning of the majority of their Lordships, and they have been already dealt with in my judgment in the case of *Allen* v. *Flood*.[1]

In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed.

The learned Judge before whom the case was tried, with reference to the words "wrongfully and maliciously" in the first question, told the jury that the questions to be answered by them were matters of fact only to be determined on the evidence, and in particular involved the question whether the intention of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests. The verdict affirms that this was the fact, for after the direction of the learned Judge no other interpretation can be given to the finding that the acts complained of were done by the defendants "wrongfully and maliciously."

This being clearly so, the question now raised is really whether, in consequence of the decision of this House in the case of *Allen* v. *Flood*,[1] and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another, and not to advance the parties' own trade interests, and injury has resulted, no action will lie, or, to put the question in a popular form, whether the decision in *Allen* v. *Flood*[1] has made boycotting lawful.

[1] (1898) A. C. 1.

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Apart from the decision in that case, the judgment of the learned Judges in Ireland would have been unanimous in affirming the principle to which FitzGibbon, L. J., gave effect. The general law cannot, I think, be more happily stated than in the passage from the judgment of Lord Bowen in the *Mogul Case*,[1] which was quoted by the Lord Chancellor with an expression of his strong approval in the case of *Allen* v. *Flood*[2] [His Lordship read the passage]. The Lord Chancellor also spoke with approval, as I should certainly do, of the views to a similar effect stated by Sir William Erle in his work on Trade Unions.

It may be true that in certain cases the object of inflicting injury, and success in that object, requires combination or conspiracy with others in order to be effectual. That was not so in all of the cases enumerated by Lord Bowen; but no question on that point arises in the circumstances of this particular case, for according to the evidence and the verdict of the jury the defendants by combined action wrongfully and maliciously induced a number of persons to refrain from dealing with the plaintiff. That is sufficient for the decision of the case, although, in my opinion, it is further proved that they succeeded in inducing a servant and a customer of the plaintiff to break existing contracts with him. On the whole, it seems to me clear that the defendants were guilty of unlawful acts, unless the judgment in the case of *Allen* v. *Flood*[3] has introduced a change which has rendered such acts lawful.

As to the vital distinction between *Allen* v. *Flood* and the present case, it may be stated in a single sentence. In *Allen* v. *Flood*[3] the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests." It is unnecessry to quote from the judgments of the majority of the learned Judges in *Allen* v. *Flood*[3] to shew their opinions on the importance of this essential point.

[1] 23 Q. B. D. 614. [2] (1898) A. C. at p. 74.

[3] (1898) A. C. 1.

Lord Herschell, for example, said :[1] "The object which the defendant and those whom he represented, had in view throughout was what they believed to be the interest of the class to which they belonged ; the step taken was a means to that end." And the other noble and learned Lords in the majority expressed themselves to a similar effect. For myself, what I said was this :[2] "If anything is clear on the evidence, it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did ; that this was his motive of action, and not a desire, to use the words of the learned Judge, 'to do mischief to the plaintiffs in their lawful calling.' The case was one of competition in labour, which, in my opinion, is in all essentials analogous to competition in trade, and to which the same principles must apply."

The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen in what he said and did was only exercising the right of himself and his fellow-workmen as competitors in the labour market, and the effect of injury thus caused to others from such competition, which was legitimate, was not a legal wrong.

It is only necessary to add that the defendants here have no such defence as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal ; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen* v. *Flood*,[3] as a case of legitimate competition in the labour market, is essentially different, and gives no ground for the defendant's argument.

I concur with your Lordships in holding that there is not sufficient ground for disturbing the verdict on the question of

[1] (1898) A. C. at page 132.
[2] (1898) A. C. at page 163.
[3] (1898) A. C., 1.

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damages, and in holding that the special provision of the 3rd section of the Conspiracy Act of 1875 has no application to the circumstances of this case.

Lord Brampton.—My Lords, this case now awaiting your Lordships' final judgment is one which, looked at simply as affecting the parties to it, is of no serious pecuniary concern; but it involves, nevertheless, questions of widespread importance to every trader and to every employer and servant engaged in trade.

It is an action originally brought in the High Court in Ireland by Henry Leathem, the respondent, as plaintiff, against Joseph Quinn (the sole appellant) and four other persons, named respectively John Craig (now dead), John Davey, Henry Dornan, and Robert Shaw, as defendants, to recover damages for a wrongful interference with the plaintiff's business of a butcher at Lisburn, a few miles from Belfast. For upwards of twenty years before July, 1895, Leathem had carried on business in Lisburn, having as one of his constant customers Andrew Munce (now also dead), who kept a butcher's shop at Belfast, to whom he supplied weekly twenty or thirty pounds' worth of the best meat; and he had in his employ as assistants several men at weekly wages.

In February, 1895, a trade union society was registered under the Trade Union Acts, 1871 and 1876, by the name of "The Belfast Journeymen Butchers and Assistants' Association." Of this society Craig was president, Quinn treasurer, and Davey secretary; they were original members; the other defendants, Dornan and Shaw, joined subsequently as mere ordinary members. Leathem was not a member, nor were any of his assistants. The members of the society amongst themselves soon adopted an unregistered rule that they would not work with non-union men, nor would they cut up meat that came from a place where non-union hands were employed; but there was no evidence that, prior to July, 1895, this had been productive of any conflict between Leathem's men and the union.

Early in that month, however, Leathem, on the invitation of Davey, attended a meeting of the society held at Lisburn. All the defendants were there. The occurrences at this meeting shewed the existence of an angry feeling, and an overbearing

determination on the part of the defendants to compel Leathem to employ none but union men, which culminated in the lawless conduct the subject of this action.

Leathem had at that time among his assistants a man named Robert Dickie, a family man, with young children dependent upon him; this man had been in his employ for ten years. He was desirous of keeping him and all the others employed by him in his service; but still of doing anything in reason to conciliate the society. But I had better let him tell his account of this meeting in his own words, as he told it to the jury. "I said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. The defendant Shaw got up and objected to their being allowed to work on, and to their admission, and said that my men should be put out of my employment, and could not be admitted, and should walk the streets for twelve months. I said it was a hard case to make a man walk the streets with nine small children, I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded the resolution, and it was carried. Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked some out and said they could work for me. I said they were not suitable for my business, and I would keep the men I had. They said I had to take them. I said I would not put out my men. Craig then spoke, and told me my meat would be stopped in Andrew Munce's if I would not comply with their wishes."

The Chairman spoke truly; for on September 6 the secretary of the society wrote to Leathem, asking "whether he had made up his mind to continue to employ non-union labour," adding, "If you continue as at present, our society will be obliged to adopt extreme measures in your case." He wrote also to Mr. Munce on September 13, stating that a deputation had been appointed to wait upon him to come to a decision in regard to his purchase of meat from Leathem & Sons as they were anxious to have a settlement at once. To this letter Mr. Munce sent, on September 14, a very sensible reply: "It is quite out of my province to interfere with the liberty of any man. But why refer to me in the matter? I do not think it fair for you to

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come at me, seeing it appears to be the Messrs. Leathem that you wish to interfere with." A deputation, which included Craig, Quinn, Shaw, and Dornan, had an interview with a son of Mr. A. Munce, and on September 17 he wrote to the secretary the reply of his father, "that he could not interfere to bring pressure to bear on Mr. Leathem to employ none but society men by refusing to purchase meat from him, as that would be outside his province and interfering with the liberty of another man." The 18th of September brought a definite announcement from the secretary to Mr. Munce that, having failed to make a satisfactory arrangement with Mr. Leathem, they had no other alternative but to instruct his (Munce's) employees "to cease work immediately Leathem's beef arrives." Thereupon Mr. Munce was constrained to send to Leathem on September 20 a telegram: "Unless you arrange with society you need not send any beef this week, as men are ordered to quit work." On and from that day Munce took no more meat from Leathem, to his substantial loss.

Another mode adopted by several of the defendants with a view to prevent persons dealing with Leathem was the publication throughout the district of Lisburn of "black lists" containing and holding up to odium, not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him or any other non-society shops. Amongst others, a man named McBride, a customer of Leathem, was operated on by this mode, and ceased to deal with him; attempts were also made by means of such lists to influence two other men named Devis and Hastings. With the object of further inconveniencing Leathem in his trade, two of his weekly servants, Rice and McDonnell, who had been non-union men, were somehow or other induced to join the society and to quit their service with Leathem. It is true they gave due notice of their intention to do so, and as regards them, before, no separate cause of action could be maintained. But it is significant that after they had left their service they were paid by the society during the time they were out of work weekly sums of money as compensation for the wages they would have earned with Leathem. As regards the assistant, Robert Dickie, he left his service without any notice in the middle of a week, and so

wrongfully broke his contract with his employers, and there was an abundance of evidence that he was induced to do that wrongful act through the unjustifiable influence of the defendants, for Dickie's evidence at the trial was that he was brought out of Leathem's shop by Rice to a meeting of the society in a room over the defendant Dornan's shop; that Shaw (another defendant) was there; that they wanted him to leave Leathem because the rest were out, and promised to pay him what he had from Leathem; that he left, and was paid by Rice for the society and was then in Dornan's service.

The case came on for trial at the Belfast Assizes in July, 1896, before FitzGibbon, L. J., and a special jury. The pleadings charged in the first four counts, as separate causes of action, (1) the procuring Munce to break contracts he had made with Leathem; (2) the publication by the defendants of "black lists"; (3) the intimidation of Munce and other persons to break their contracts; and (4) the coercion of Dickie and other servants to leave the service of the plaintiff. Each of these counts alleged that the acts complained of were done "wrongfully and maliciously, and with intent to injure the plaintiff and to have occasioned him actual loss, injury, and damage." The fifth and last count charged, also as a separate cause of action, that the defendants unlawfully and maliciously conspired together, and with others, to do the various acts complained of in the previous counts, with intent to injure the plaintiff and his trade and business, and that by reason of the conspiracy he was injured and damaged in his trade. Damages and an injunction were claimed.

The evidence adduced I have already set forth substantially. At the conclusion of it Mr. O'Shaughnessy, Q. C., for the defendants, submitted that they were entitled to a non-suit upon the grounds that there was no evidence of a contract between Munce and Leathem, nor of any pecuniary damage to the plaintiff by reason of the acts of the defendants, and that the acts of the defendants were legitimate. The Learned Lord Justice refused to non-suit, and I think he rightly refused. For there was clearly evidence for the consideration of the jury upon one or more of (I think upon all) the causes of action. I need not discuss that point further, for it was practically disposed of during the argument before this House.

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No evidence was called for the defendants. I regret that no shorthand note of the summing up of the Lord Justice was furnished to your Lordships. We have, however, a copy of the learned Judge's own notes and memoranda. From a careful perusal of these I am satisfied that every indulgence that could have been reasonably given to the learned counsel in presenting his case to the jury was allowed him, and I am satisfied that he must be taken to have acquiesced in the form in which the questions submitted for the consideration of the jury were left to them, even though it might otherwise have been open to criticism.

After commenting upon the evidence relied upon by the plaintiff as proof of actionable misconduct, he told the jury that they had to consider whether the interests and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him as distinguished from acts legitimately done to secure or advance their own interests; that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, by reasonable and legitimate means were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, he told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants, to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade. And having so told the jury, he proposed to put to them as the question they had to try upon the evidence: Whether the acts of the defendants were or were not in that sense actionable?

I have thought it right, as near as possible, to follow the language of the Lord Justice, for that charge was delivered

before *Allen* v. *Flood*[1] was decided in this House. In substance I think it was correct, having regard to the case before him. In some respects it seems to me that it was a little too favourable to the defendants, but even had it been otherwise it was uttered in the presence of the defendants' counsel, who desired and was allowed then and there to make such objections as he thought fit to it. He made four only: first, that the Judge had given no definition of damage; second, that he had told the jury that the liability of the defendants depended on a question of law. These two questions were to my mind conclusively answered in the summing up: see p. 33 of Appendix.

A third objection was that the question relating to the black list should be separately left to the jury. It was then so left, and as to that the Judge directed them that there was not sufficient evidence to connect Quinn and Craig with the black lists. By this I take it he meant not as an independent cause of action, there being, in fact, no evidence of Quinn's personal participation in the publication of those lists. But that left him still affected by them as overt acts of the conspiracy, for each of which every one of the conspirators is liable, and the evidence touching the black lists was beyond all question admissible under the conspiracy count.

The fourth objection was that there was no evidence of any binding contract having been broken through the action of the defendants; but the Judge then again declined to withdraw that question of contract from the jury, and I think he was right in so refusing at that stage of the trial; and at a later stage, after the whole matter had been disposed of under the conspiracy count, he rightly refrained from putting the question at all, because it had become unnecessary. At the request of the learned counsel, however, he divided the single general question he at first proposed in the three separate questions:—(1) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? (2) Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his

[1] (1898) A. C., 1.

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employment, and were such persons so induced not to do so? (3) Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and, if so, did the publication so injure him? The jury answered each of these questions in the affirmative, and assessed the damages against all the defendants at 200*l.*; and with regard to the third question, they found against the defendants, Dornan, Davey, and Shaw, with an additional 50*l.* as damages against them only. Judgment was given in accordance with that verdict.

If, my Lords, before that judgment was given the counsel for either party had felt it of importance that the specific issues raised upon each count should be determined by the jury, the learned Judge would, no doubt, have applied himself to attain that object; but when, as it oftentimes happens in the course of a trial, it is obvious to everybody concerned in it that the case may conveniently be determined by the answer of the jury to one general comprehensive question involving the whole of the material matters at issue, and all parties either expressly or tacitly acquiesce in that view, and such question is accordingly put to and answered by the jury, neither party can afterwards hark back to the original issues raised by the pleader on the record long before it was possible for him to know how the case can best be dealt with when the evidence is all disclosed. Here the real substantial question was whether there had existed between all or any two or more of the defendants an unlawful conspiracy to injure the plaintiff in his trade, and, if so, whether the plaintiff had been specially injured thereby, all the wrongful acts charged in the previous counts being treated as overt acts of such conspiracy. To support that conspiracy count it was not essential that every overt act alleged should be proved, but only a sufficient number of them to support the count. The issues on that count having been found by the jury, and damages assessed in favour of the plaintiff, the separate issues became immaterial, since they had already been treated as incorporated for all purposes of the action in it. I note, in confirmation of this, that the Lord Justice pointedly told the jury that proof of a conspiracy was essential to the support of the action.

In substance, this finding of the jury amounted to a general verdict against all the defendants, except on the issue relating to

the black lists, with 200*l.* damages, and as to that issue against Davey, Dornan, and Shaw only, with separate and further damages, 50*l.*

Rightly understood, I think the judgment in *Allen* v. *Flood*[1] is harmless to the present case. But I need hardly say that, in order properly to understand and appreciate it, it is essential to ascertain what were the material facts assumed to exist by their Lordships who assented to that judgment and what were the principles of law applied by them to those facts. This necessity will be more apparent when it is realized that unanimity of opinion as to the facts certainly did not prevail, that the Judges who were called upon to render their assistance to the House were requested to answer this one simple question only, namely, "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" This evidence was only to be found in the Appendix handed to each of the Judges as containing the evidence referred to, and to that evidence the Judges naturally applied themselves, and upon it their opinions were formed. That evidence of the plaintiffs' witnesses most certainly did not altogether coincide with some very material facts assumed by their Lordships; this will account for variance in the views expressed as to the legal rights and alleged wrongful acts of the parties. It would be an endless task to endeavour to reconcile all these differences of fact and opinion; I will not, therefore, make the attempt.

Some of this confusion arose no doubt from the course taken, rightly or wrongly, at the trial, when all questions of conspiracy, intimidation, coercion, or breach of contract were withdrawn from the jury, the only matters of fact found by them being that Allen maliciously induced the Glengall Company to discharge Flood and Taylor from their employment, and not to engage them again, and that each plaintiff had suffered 20*l.* damages.

I collect from the case, as reported, that it was assumed by their Lordships that the Glengall Company were under no contractual obligation to retain the plaintiffs Flood and Taylor, in

[1] (1898) A. C., 1.

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their service for any duration of time, but might dismiss them from their employment at any moment it was their will so to do, and that the boiler-makers were working under the same conditions; that Allen in making the communication which induced the Glengall Company to dismiss the plaintiffs was doing only that which he had a legal right to do, and they held, therefore, that the plaintiffs had no legal cause of action against either Glengall Company or the defendant, and that the mere fact as found by the jury that the defendant was actuated by a malicious motive could not convert a rightful into a wrongful act.

This latter proposition, that the exercise of an absolutely legal right cannot be treated as wrongful and actionable merely because a malicious intention prompted such exercise, was established as clear law by this House in *Bradford Corporation* v. *Pickles*,[1] and it is now too late to dispute it, even if one were disposed to do so, which I am not. It must not, however, be supposed that a malicious intention can in no case be material to the maintenance of an action. It is commonly used to defeat the defence of privilege to do or to say that which without privilege would be wrongful and actionable.

Take the familiar instance of an action for malicious prosecution. It is not a wrongful act for any person who honestly believes that he has reasonable and probable cause, though he has it not in fact, to put the criminal law in motion against another; but if to the absence of such reasonable and probable cause a malicious motive operating upon the mind of such prosecutor is added, that which would have been a rightful (in the sense of a justifiable) act if done without malice becomes with malice wrongful and actionable. What would constitute such malice it is not material for the purposes of this case to define. Of course, if when he instituted criminal proceedings the prosecutor knew he had no reasonable ground for the steps he was taking, the definition of malice given by Bayley, J., in *Bromage* v. *Prosser*[2] would distinctly apply, and no further proof of malice would be required; but if he really believed he had such reasonable cause, although in fact he had it not, and was actuated not by such belief alone,

[1] (1895) A. C., 587.

[2] 4 B. & C., 247; 28 R. R. 241.

but also by personal spite or a desire to bring about the imprisonment of or other harm to the accused, or to accomplish some other sinister object of his own, that personal enmity or sinister motive would be quite sufficient to establish the malice required by law to complete a cause of action—that is, if such malice was found as a fact by the jury.

In this case the alleged cause of action is very different from that in *Allen* v. *Flood*.[1] It is notdependent upon coercion to break any particular contract or contracts, though such causes of action are introduced into the claim; but the real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader in carrying on his business, and by so doing to invade his undoubted right, thus described by Alderson B. in delivering the judgment of the Exchequer Chamber in *Hilton* v. *Eckersley* [2]: "*primâ facie* it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion."

To this I would add the emphatic expression of the Lord Chancellor, Lord Halsbury, in the *Mogul case* [3]: "All are free to trade upon what terms they will"; and of Lord Bramwell, who in *Reg.* v. *Druitt*[4], in a passage quoted by Lord Halsbury in the same case said[5]: "The liberty of a man's mind and will to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body." Again, Sir W. Erle thus expresses himself: "Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." [6] I am not aware that the rights thus stated have ever been seriously questioned. I rest my judgment upon

[1] (1898) A. C., 1.
[2] 6 E. & B., 74.
[3] (1892) A. C., 38.
[4] 10 Cox. C. C., 600.
[5] (1892) A. C., at p. 73.
[6] Erle on Trade Unions, p. 12.

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the principle expressed in these few sentences. I seek for no more.

The remedy for the invasion of a legal right is thus stated by Lord Watson in his judgment in *Allen* v. *Flood* [1]: "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed."

I cannot suppose any intelligent person reading the evidence adduced on the trial of this case failing to come to the conclusion that the acts complained of amounted to a serious and wrongful invasion of the plaintiff's trade rights, and I am at a loss to comprehend upon what ground it is that the defendants seek to justify or excuse their action towards him.

As members of a trade union society they have no more legal right to commit what would otherwise be unlawful wrongs than if the association to which they are attached had never come into existence. They have no more right to coerce others pursuing the same calling as themselves to join their society, or to adopt their views or rules, than those who differ from them and belong to other trade associations would have a right to coerce them. The Legislature in conferring upon trades unions such privileges as are contained in the Trade Union Acts, 1871 and 1876, does not empower them to do more than make rules for the regulation of their own conduct and to provide for their own mutual assistance, and leaves each member as free to cease to belong to it and to repudiate every obligation for future observance of its rules as though he had never joined it; and most certainly it has not conferred upon any association or any member of it a licence to obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labour in the way he thinks fit, provided only that it is lawful: see Erle, J., in *Reg.* v. *Rowlands*[2]; and although a combination of members of a trade union for certain purposes is no longer unlawful and criminal as a conspiracy merely because the objects of that combination are in restraint of trade, no protection is given to any combination or conspiracy which before

[1] (1898) A. C., at p. 92.

[2] (1851) 2 Den. C. C. 364.

the passing of the Act of 1871 would have been criminal for other reasons.

Not a word is to be found in the Trade Union Acts or in the Conspiracy Act of 1875 sanctioning such conduct as that complained of. Indeed, one cannot read the 7th section of the latter Act imposing penalties for undue coercion and intimidation without seeing that it had no intention to tolerate such proceedings as in this case are complained of, but rather to protect those upon whom coercive measures might be practised. I may also note that the 3rd section of that Act does not apply to civil proceedings by action.

It would not be useful to examine again all the numerous cases upon the citation and discussion of which much time has been expended, for not one of them would really assist the appellant in defence of his or his co-conspirators' conduct.

The *Mogul Case* [1] contains no doubt a mass of valuable, interesting, and useful law as to the length to which competing traders may go in pushing and endeavouring to promote their respective interests, and yet keep within bounds that are legal, though the stronger and more wealthy of them may sometimes press hardly upon the weaker whose capital is limited. One trader may by his mode of carrying on his trade hold out attractions and allurements which may enlist so many of his rival's customers as will well-nigh, perhaps wholly, destroy his trade.

But not a word will be found in that case justifying an active interference with the right of every trader to carry on his business in his own manner, so long as he does not interfere with a similar legal right which is vested in his neighbour and observes the correlative duty pointed out by Sir W. Erle.

My noble friend, the Lord Chancellor, accurately summed up the position of things in the *Mogul Case* [1] in these words: "What legal right was interfered with? What coercion of the mind, will, or person is effected? All are free to trade on what terms they will, and nothing has been done except in rival trading which could be supposed to interfere with the appellant's interests."

[1] (1892) A. C., 25.

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But I will not linger upon a consideration of what may be done in competition, for competition is not even suggested as a justification of the acts now complained of—acts of wanton aggression the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade.

It cannot be—it was not even suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirement, or in support of any lawful right of the association or any member of it, or to obtain or maintain fair hours of labour or fair wages, or to promote a good understanding between employers and employed and workman and workman, or for the settlement of any dispute, for none had existence. It would, indeed, be a strange mode of promoting such good understanding to coerce a tradesman's customers to leave him because he would not, at the bidding of the association, dismiss workmen who desired to continue in his service and whom he wished to retain to make way for others he did not want.

I will deal now with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, to embark upon a history of the law relating to the subject, or to the old and obsolete writ of conspiracy. It would be useless for our present purpose.

I will endeavour briefly to state how I view the matter practically, so far as it concerns this case.

A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved. This is the substance of the decision in *Barber*

v. *Lesiter*.[1] I quote as a very instructive definition of a conspiracy the words of a great lawyer, Willes, J., in *Mulcahy* v. *Reg.*[2] in delivering the unanimous opinion of himself, Blackburn, J., Bramwell, B., Keating, J., and Pigott, B., which was adopted by this House: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. ..The number and the compact give weight and cause danger."

It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present.

In 1870 Cockburn, C. J., in delivering the unanimous judgment of Channell, B., Cleasby B., Keating and Brett, JJ., in *Reg.* v. *Warburton*,[3] said: "It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *i.e.*, amount to a civil wrong."

It has often been debated whether, assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts, no one of which taken singly and alone would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, and if by those acts substantial damage was caused to the person against whom the conspiracy was directed: my own opinion is that they would.

In dealing with the question it must be borne in mind that a conspiracy to do harm to another is, from the moment of its

[1] 7 C. B. (N. S.) 175.
[2] (1868) L. R., 3 H. L., at p. 317.
[3] L. R., 1 C. C., 276.

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formation, unlawful and criminal, though not actionable unless damage is the result.

The overt acts which follow a conspiracy form of themselves no part of the conspiracy : they are only things done to carry out the illicit agreement already formed, and if they are sufficient to accomplish the wrongful object of it, it is immaterial whether singly those acts would have been innocent or wrongful, for they have in their combination brought about the intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished.

Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison. Many illustrations of these views might be suggested, but I need them not if I have made myself understood.

The cases bearing upon the subject are not very numerous : the whole subject was fully discussed in the *Mogul case* [1] in each of its stages—to it I simply refer. *Rex* v. *Journeymen Tailors of Cambridge* [2] was an indictment for a common law conspiracy by workmen to raise wages. On objection taken to the indictment it was upheld for the reason given that the conspiracy was illegal, although the matter about which they conspired might have been lawful for them or any to do if they had not conspired to do it : *Rex* v. *Eccles*,[3] before Lord Mansfield, was an indictment for a conspiracy by indirect means to deprive and hinder one Booth from using and exercising his trade of a tailor, and in pursuance of that conspiracy hindering and preventing him from following his said trade to his great damage. It was held unnecessary to set out the means

[1] (1892) A. C., 25.
[2] (8 Geo. 1) 8 Mod., 11.
[3] 1 Lea. C. C., 274.

by which the intended mischief was effected, "for the offence does not consist in doing those acts, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offence." See also per Grose, J., in *R.* v. *Mawbey* [1].

If I rightly understand the judgment of Darling, J., in *Huttley* v. *Simmons*,[2] he treated *Allen* v. *Flood* [3] as a binding authority compelling him to hold that the object of the conspiracy as proved was not unlawful; in that view he rightly decided that the count for conspiracy could not be maintained. If he had held that, although the object of the conspiracy was unlawful, yet if the overt acts were not so, because they would not have been unlawful if done by one individual without any conspiracy, and had decided on that ground, I should have differed.

I am conscious that I have occupied more of your Lordships' time than I had intended, but the case is of real importance, and I feel that such unlawful conduct as has been pursued towards Mr. Leathem demanded serious attention. I think the law is with him, and that the damages awarded by the jury are under the circumstances very moderate. It is at all times a painful thing for any individual to be the object of the hatred, spite, and ill-will of any one who seeks to do him harm. But that is as nothing compared to the danger and alarm created by a conspiracy formed by a number of unscrupulous enemies acting under an illegal compact, together and separately, as often as opportunity occurs regardless of law, and actuated by malevolence, to injure him and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has, I think, been employed by the defendants for the perpetration of organised and ruinous oppression.

I think the judgment in the Court below ought to be affirmed and this appeal dismissed with costs.

Lord Robertson.[4]—My Lords, in my opinion the judgment appealed against was right for the reasons given by Holmes, L. J.

[1] (1796) 6 T. R., 619; 3 R. R., 282.
[2] (1898) 1 Q. B., 181.
[3] (1898) A. C., 1.
[4] Read by Lord Davey in Lord Robertson's absence.

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LORD LINDLEY.[1]—My Lords, the case of *Allen* v. *Flood*[2] has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union, namely, Allen and two others, for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs.[3] The action was tried before Kennedy, J., who ruled that there was no evidence to go to the jury of conspiracy, intimidation, coercion, or breach of contract. The result of the trial was that the plaintiffs obtained a verdict and judgment against Allen alone. He appealed, and the only question which this House had to determine was whether what he had done entitled the plaintiffs to maintain their action against him. What the jury found that he had done was, that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble Lords who formed the majority of your Lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiff.[4] There being no question of conspiracy, intimidation, coercion, or breach of contract for consideration by the House, and the majority of their Lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he had acted maliciously and with intent to injure the plaintiffs did not, without more evidences entitle the plaintiffs to maintain the action.

[1] Read by Lord Davey in Lord Lindley's absence.

[2] (1898) A. C., 1.

[3] (1895) 2 Q. B., 22, 23; (1898) A. C., 3.

[4] (1898) A. C., p. 19, Lord Watson; p. 115, Lord Herschell; pp. 147-150, Lord Macnaghten; pp. 161, 165, Lord Shand; p. 175, Lord Davey; p. 178, Lord James.

My Lords, this decision, as I understand it, establishes two propositions: one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first.

The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time in *Allen* v. *Flood* [1]; it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition care, however, must be taken to bear in mind, *first*, that in *Allen* v. *Flood* [1] criminal responsibility hed not to be considered. It would revolutionise criminal law to say that the criminal responsibility for conduct never depends on intention. *Secondly*, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful," *i.e.*, to acts involving no breach of duty, or, in other words, no wrong to any one. I shall refer to this matter later on.

The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. I have already stated what he did, and all that he did, in the opinion of the majority of the noble Lords. If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiffs is perfectly intelligible, and indeed unavoidable. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention of the informant may have been.

My Lords, the questions whether Allen had more power over the men than some of their Lordships thought, and whether Allen did more than they thought, are mere questions of fact. Neither of these questions is a question of law, and no Court or jury is bound as a matter of law to draw from the facts before it inferences of fact similar to those drawn by noble Lords from the evidence relating to Allen in the case before them.

[1] (1898) A. C., 1.

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I will pass now to the facts of this case, and consider (1) what the plaintiff's rights were; (2) what the defendant's conduct was; (3) whether that conduct infringed the plaintiff's rights. For the sake of clearness it will be convenient to consider these questions in the first place apart from the statute which legalises strikes, and in the next place with reference to that statute.

1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late Bowen, L. J., in his admirable judgment in the *Mogul Steamship Company's case*,[1]

[1] 23 Q. B. D., 613 at p. 614.

may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen* v. *Flood* [1] to be opposed to it.

If the above reasoning is correct, *Lumley* v. *Gye* [2] was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton* v. *Russell* [3] ought to have been decided and may be upheld on this principle. That case was much criticised in *Allen* v. *Flood* and not without reason; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in *Allen* v. *Flood* [1] But in *Temperton* v. *Russell* [3] there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

2. I pass on to consider what the defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workman of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendant's union; but this would not satisfy the defendants. The facts of this case are entirely different

[1] (1898) A. C., 1. [2] 2 E. & B., 216. [3] (1893) 1 Q. B., 715.

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from those which this House had to consider in *Allen* v *Flood*.[1] In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned Judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case.

3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff—not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your Lordships have to deal with a case, not of *damnum absque injuria*, but of *damnum cum injuria*.

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the *Mogul Steamship Company* v. *MacGregor*[2] and *Allen* v. *Flood*,[1]

[1] (1898) A. C., 1.
[2] (1892) A. C., 25.

and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen* v. *Flood* [1] in favour of the appellant. His sheet-anchor is *Allen* v. *Flood* [1] which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen* v. *Flood* Lord Herschell [2] expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen* v. *Flood* [1] there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination

[1] (1898) A. C., 1.
[2] (1898) A. C., at pp. 128, 138.

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to prevent others from working by annoying them if they do is a very different thing, and is *primâ facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Amongst the American cases I would refer especially to *Vegelahn* v. *Guntner*,[1] where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the *Mogul Steamship Co.*[2] that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen* v. *Flood*[3] emphasises the same doctrine. The principle was strikingly illustrated in the *Scottish Co-operative Society* v. *Glasgow Fleshers' Association*,[4] which was referred to in the course of the argument. In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned Judge held that the plaintiffs showed no cause of action, although the

[1] 167 Mass., 92.
[2] (1892) A. C., 25; 23 Q. B. D., 598.
[3] (1898) A. C., 1.
[4] 35 Sc. L. R., 645.

butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infrigement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to shew.

Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals but between associations and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings: it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock-out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is *primâ facie*, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded.

My Lords, the appellant relied on several authorities besides those already referred to which I will shortly notice. No coercion of the plaintiff's employer, customers, servants, or friends had to be considered in *Kearney* v. *Lloyd*.[1] This is fully shewn in the various judgments now under review.

In *Huttley* v. *Simmons*[2] the plaintiff was a cab-driver in the employ of a cab-owner. The defendants were four members of a trade union who were alleged to have maliciously induced the cab-owner not to employ the plaintiff, and not to let him have a cab to drive. The report does not state the means employed to induce

[1] 26 L. R. Ir., 268.

[2] (1898) 1 Q. B., 181.

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the cab-owner to refuse to have any dealings with the plaintiff. The learned Judge who tried the case held that as to three of the defendants the plaintiff had no case and that as to the fourth, against whom the jury found a verdict, no action would lie because he had done nothing in itself wrong, apart from motive; and that the fact that he acted in concert with others made no difference. It is difficult to draw any satisfactory conclusion from this case, as the most material facts are not stated.

I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned Judge who tried the case was correct, so far as the liability of the defendant turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned Judge did not distinguish between coercion to break contracts of service, and coercion to break contracts of other kinds, and coercion not to enter into contracts.

I pass now to consider the effect of the Statute 38 & 39 Vict., c. 86. This Act clearly recognises the legality of strikes and lock-outs up to a certain point. It is plainly legal now for workmen to combine not to work except on their own terms. On the other hand, it is clearly illegal for them or any one else to use force or threats of violence to prevent other people from working on any terms which they think proper. But there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts and degrees: picketing is a distinct annoyance, and if damage results is an actionable nuisance at common law, but if confined merely to obtaining or communicating information it is rendered lawful by the Act (s. 7). Is a combination to annoy a person's customers, so as to compel them to leave him unless he obeys the combination, permitted by the act or not? It is not forbidden by s. 7; is it permitted by s. 3? I cannot think that it is. The Court of Appeal (of which I was a member) so decided in *Lyons* v. *Wilkins*,[1] in the case of Schornthal, which arose there, and is referred to in the judgment of Walker, L. J., at p. 99 of the printed judgments in this case. This particular point had not to be reconsidered when *Lyons* v. *Wilkins*[1] came before the Court of Appeal after the decision in *Allen* v. *Flood*.[2] But

[1] (1896) 1 Ch., 811.

[2] See (1899) 1 Ch., 266.

Byrne, J., modified the injunction granted on the first occasion by confining it to watching and besetting. He might safely have gone further and have restrained the use of other unlawful means ; but the strike was then over, and his modification was not objected to, and cannot be regarded as an authority in favour of the appellant's contention.

It must be conceded that if what the defendants here did had been done by one person it would not have been punishable as a crime. I cannot myself see that there was in this case any trade dispute between employers and workmen within the meaning of s. 3. I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them have any dispute can invoke the benefit of this section even on an indictment for a conspiracy.

But assuming that there was a trade dispute within the meaning of s. 3, and that an indictment for conspiracy could not be sustained in a case like this, the difference between an indictment for a conspiracy and an action for damages occasioned by a conspiracy is very marked and is well known. An illegal agreement, whether carried out or not, is the essential element in a criminal case ; the damage done by several persons acting in concert, and not the criminal conspiracy, is the important element in the action for damages.[2] In my opinion, it is quite clear that s. 3 has no application to civil actions : it is confined entirely to criminal proceedings. Nor can I agree with those who say that the civil liability depends on the criminality, and that if such conduct as is complained of has ceased to be criminal it has therefore ceased to be actionable. On this point I will content myself by saying that I agree with Andrews, J., and those who concurred with him. It does not follow, and it is not true, that annoyances which are not indictable are not actionable. The law relating to nuisances, to say nothing of the law relating to combinations, shews that many annoyances are actionable which are not indictable, and the principles of justice on which this is held to be so appear to me to apply to such cases as these.

[1] See (1899) 1 Ch. at pp. 258, 259.

[2] See 1 Wm. Saund. 229b, 230, and *Barber* v. *Lesiter*, 7 C. B. (N. S.) 175.

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My Lords, I will detain your Lordships no longer. *Allen* v. *Flood*[1] is in many respects a very valuable decision, but it may be easily misunderstood and carried too far.

Your Lordships are asked to extend it and to destroy that individual liberty which our laws so anxiously guard. The appellant seeks by means of *Allen* v. *Flood*[1] and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by trades union in one of its most objectionable forms is lawful, and gives no cause of action to its victims although they may be pecuniarily ruined thereby.

My Lords, so to hold would, in my opinion, be contrary to well-settled principles of English law, and would be to do what is not yet authorized by any statute or legal decision.

In my opinion this appeal ought to be dismissed with costs.

Order appeal from affirmed and appeal dismissed with costs.

NOTE.

This decision of the House of Lords rules that intimidation by way of conspiracy is an actionable tort. It is an actionable wrong for two or more persons to combine or conspire together *without lawful justification*, with the intention and effect of doing harm to the plaintiff by intimidating other persons and coercing them to act in a certain way. Where this element of combination or conspiracy exists, it is not necessary that the intimidation should amount to a threat of illegal action; any threat to inflict harm upon the persons so intimidated, if they do not act in the way desired, amounts to actionable intimidation. The essence of the wrong consists in the combination of two or more persons to exercise their legal power over other persons for the purpose of compelling them to do harm to the plaintiff.

The earlier case of *Allen* v. *Flood*, (1898) A. C. 1, is in its actual facts indistinguishable from *Quinn* v. *Leathem*, yet the decision of the House of Lords was different. In explanation of this conflict, it may be observed that in the earlier case, the plaintiff failed to prove combination or conspiracy. He proved nothing except the isolated act of a single defendant, and the jury found merely that the defendant maliciously induced the employers of the plaintiff to discharge him from their service. The House of Lords held that this fact alone did not give the plaintiff a cause of action on the principle that merely to induce another to refrain from entering into a contract is not in itself and without more an actionable wrong and it does not become actionable even though the act was inspired by malice. The decision in *Allen* v. *Flood*, has therefore no application to a case which involves the elements of oppressive combination.

Reference may be made on this difficult subject to Bigelow on Torts, 8th Edn., Ch. VI and VII.

[1] (1898) A. C., 1.

WILLIAM DERRY

v.

SIR HENRY WILLIAM PEEK.

[*Reported in L.R., 14 App. Cas., 337.*]

The following judgment was delivered by

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July, 1.

Lord Horschell.—My Lords, in the statement of claim in this action, the respondent, who is the plaintiff, alleges that the appellants made in a prospectus issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

"This action is one which is commonly called an action of deceit, a mere common law action." This is the description of it given by Cotton, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned Judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned Judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

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There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose especial province it lay to know a particular fact, has given an erroneous answer to an enquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes* v. *Lock* [1] may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in *Brownlie* v. *Campbell* [2] that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned Judges in the Court of Appeal in the case before your Lordships. "An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit." This was the language of Cotton, L. J., in *Arkwright* v. *Newbould* [3]. It was adopted by Lord Blackburn in *Smith* v. *Chadwick*,[4] and is not, I think, open to dispute.

In the Court below Cotton, L. J., said: "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed or any of the class to whom it was addressed and who was materially induced by the mis-statement to do an act to his prejudice." About much that is here stated there cannot, I

[1] 10 Ves. 470.
[2] 5 App. Cas., at p. 935.
[3] 17 Ch. D., 320.
[4] 9 App. Cas., 193.

think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, *that is* without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action.

That the learned Lord Justice thought that if a false statement were made without reasonable ground for believing it to be true an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated amongst persons in order to induce them to take shares, "there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others."

The learned Judge proceeds to say: "Although in my opinion it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty, that is to say, an untrue statement made without any reasonable ground for believing that statement to be true; and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing

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that statement to be true he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them."

Now I have first to remark on these observations that the alleged "right" must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statement of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue statement without any reasonable ground for believing it to be true. I have further to observe that the Lord Justice distinctly says that if there be such a departure from duty an action of deceit can be maintained, though there be not what he should call fraud. I shall have by and by to consider the discussions which have arisen as to the difference between the popular understanding of the word "fraud" and the interpretation given to it by lawyers, which have led to the use of such expressions as "legal fraud" or "fraud in law"; but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavour to shew that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the Court of Appeal. Sir James Hannen says: "I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." Again Lopes, L. J., states what, in his opinion, is the result of the cases. I will not trouble your Lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is

distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement, intended to be and in fact relied on by the person to whom it is made, may be sued by the person damaged thereby) : "Fourthly, if it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief."

It will thus be seen that all the learned Judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I need go no further back than the leading case of *Pasley* v. *Freeman*.[1] If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was at all events not so well-settled but that a distinguished Judge, Grose, J., differing from his brethren on the Bench, held that such an action was not maintainable. Buller, J., who held that the action lay, adopted in relation to it the language of Croke, J., in 3 Bulstrode, 95, who said : "Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies." In reviewing the case of *Crosse* v. *Gardner* [2] he says : "Knowledge of the falsehood of the thing asserted is fraud and deceit" ; and

[1] 2 Sm. L. C., 74.

[2] Carth., 90.

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further, after pointing out that in *Risney* v. *Selby* [1] the judgment proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds: "The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, *and the defendant knew it to be so*," the latter words being specially emphasized. Kenyon, C. J., said: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation stated on the record, by which they sustained damage. Can a doubt be entertained for a moment but that this is injurious to the plaintiffs?" In this case it was evidently considered that fraud was the basis of the action, and that such fraud might consist in making a statement known to be false.

Haycraft v. *Creasy* [2] was again an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were, "I can assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety." All the Judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. Lord Kenyon thought that fraud had been proved, because the defendant stated that to be true within his own knowledge which he did not know to be true. The other Judges thinking that the defendant's words vouching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did not believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose to inquire which view of the facts was the more sound. Upon the law there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made is essential to the maintenance of the action, and that belief in its truth affords a defence.

[1] 1 Salk., 221. [2] 2 East., 92.

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I may pass now to *Foster* v. *Charles*.[1] It was there contended that the defendant was not liable, even though the representation he had made was false to his knowledge, he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the Court, Tendal, C. J., saying: "It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad." This is the first of the cases in which I have met with the expression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the Chief Justice intended to indicate any doubt that the act which he characterised as a fraud in law was in truth fraudulent as a matter of fact also. Wilfully to tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

Foster v. *Charles*[1] was followed in *Corbett* v. *Brown*,[2] and shortly afterwards in *Polhill* v. *Walter*.[3] The learned counsel for the respondent placed great reliance on this case, because although the jury had negatived the existence of fraud in fact the defendant was nevertheless held liable. It is plain, however, that all that was meant by this finding of the jury was, that the defendant was not actuated by any corrupt or improper motive, for Lord Tenterden says: "It was contended...that in order to maintain the species of action it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which from the mode in which it is made is calculated, to induce another to act on the faith of it in such a

[1] 7 Bing., 105. [2] 8 Bing., 33. [3] 3 B. & Ad., 114.

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way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be in the legal sense of the word *a fraud*, and for this position was cited in *Foster* v. *Charles*,[1] to which may be added the recent case of *Corbett* v. *Brown*.[2] The principle of these cases appears to us to be well founded, and to apply to the present."

In a later case of *Crawshay* v. *Thompson*[3] Maule, J., explains *Polhill* v. *Walter*[4] thus: "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill* v. *Walter*."[4] In the same case, Creswell, J., defines "fraud in law," in terms which have been often quoted. "The cases," he says, "may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact to the injury of another."

In *Moens* v. *Heyworth*,[5] which was decided in the same year as *Crawshay* v. *Thompson*,[3] Lord Abinger having suggested that an action of fraud might be maintained where no moral blame was to be imputed, Parke, B, said: "To support that count (*viz.*, a count for fraudulent representation) it was essential to prove that the defendants *knowingly*" (and I observe that this word is emphasised) "by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue."

The next case in the series, *Taylor* v. *Ashton*,[6] is one which strikes me as being of great importance. It was an action brought against directors of a bank for fraudulent representations as to its affairs, whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict was sufficient to render the defendants liable; Parke, B., however, in delivering the opinion of the Court said: "It is insisted that even that (*viz.*, the gross negligence which the jury had found), accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of

[1] 7 Bing., 105. [2] 8 Bing., 33. [3] 4 M. & Gr., 357.
[4] 3 B. & Ad., 114. [5] 10 M. & W., at p. 157. [6] 11 M. & W., 401.

action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be *fraudulently made*..... ..... But then it was said that in order to constitute that fraud, it was not necessary to shew that the defendants *knew* the fact they stated to be untrue, that it was enough that the fact was untrue if they communicated that fact of a deceitful purpose, and to the proposition the Court is prepared to assent. It is not necessary to shew that the defendants knew the facts to be untrue; if they stated a fact which was untrue for a fraudulent purpose, that at the same time not *believing* that fact to be true, in that case it would be both a legal and moral fraud."

Now it is impossible to conceive a more emphatic declaration than this, that to support an action of deceit fraud must be proved, and that nothing less than fraud will do. I can find no trace of the idea that it would suffice if it were shewn that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in making the statements they did, if they had reasonably grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them.

All the cases I have hitherto referred to were in Courts of first instance. But in *Collins* v. *Evans*[1] they were reviewed by the Exchequer Chamber. The judgment of the Court was delivered by Tindal, C. J. After stating the question at issue to be "whether a statement or representation which is false in fact, but not known to be so by the party making it, but on the contrary, made honestly and in the full belief that it is true, affords a ground of action," he proceeds to say: "The current of the authorities, from *Pasley* v. *Freman*[2] downwards, has laid down the general rule of law to be, that fraud must concur with the false statement in order to give a ground of action." Is it not clear that the Court considered that fraud was absent if the statement was "made honestly, and in the full belief that it was true"?

[1] 5 Q. B., 804, 820 [2] 2 Sm. L. C., 74.

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In *Evans* v. *Edmonds* [1] Maule, J., expressed an important opinion, often quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said: "If a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood the representation may still have been fraudulently made." The foundation of this proposition manifestly is, that a person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it *knows*, yet at least that he *believes* it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true.

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it will support an action for deceit. In *Western Bank of Scotland* v. *Addie* [2] the Lord President told the jury "that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit." Exception having been taken to this direction without avail in the Court of Session, Lord Chelmsford in this House said: "I agree in the propriety of this interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement which he asserts to be the

[1] 13 C. B., 777.

[2] L. R., 1 H. L., Sc., 145, 162.

result of a *bond fide* belief in its truth, how can the *bond fides* be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least injury would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation and deceit."

I think there is here some confusion between that which is evidence of fraud, and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement, was guilty of fraud in the same way as if he had known what he stated to be false; I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the cases from *Pasley* v. *Freeman*[1] down to that with which I am now dealing. Even when the expression "fraud in law" has been employed, there has always been present, and regarded as an essential element, that the deception was wilful either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing.

I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord Cranworth. In delivering his opinion in the same case he said: "I confess that my opinion was that in what his Lordship (the Lord President) thus stated, he went beyond what principle warrants.

[1] 2 Sm. L. C., 74.

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If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to shew that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

Sir James Hannen, in his judgment below, seeks to limit the application of what Lord Cranworth says to cases where the statement made is of a matter of opinion only. With all deference I do not think it was intended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank. When this is borne in mind, and the words which follow those quoted by Sir James Hannen are looked at, it becomes to my mind obvious that Lord Cranworth did not use the words "the opinion which they had formed" as meaning anything different from "the belief which they entertained."

The opinion expressed by Lord Cairns in two well-known cases have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the person sued. I do not think they bear any such construction. In the case of *Reese Silver Mining Co.* v. *Smith* [1] he said: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." This must mean that the persons referred to were conscious when making the assertion that they were ignorant whether it was true or untrue. For if not it might be said of

[1] L. R., 4 H. L., 64, 79.

any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently; he must be ignorant that it is true, for by the hypothesis it is false. Construing the language of Lord Cairns in the sense I have indicated, it is no more than an adoption of the opinion expressed by Maule, J., in *Evans* v. *Edmonds*.[1] It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord Cairns speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure.

In *Peek* v. *Gurney* [2] the same learned Lord, after alluding to the circumstance that the defendants had been acquitted of fraud upon a criminal charge, and that there was a great deal to shew that they were labouring under the impression that the concern had in it the elements of a profitable commercial undertaking, proceeds to say: "They may be absolved from any charge of a wilful design or motive to mislead or defraud the public. But in a civil proceeding of this kind all that your Lordships have to examine is the question, was there, or was there not, misrepresentation in point of fact? If there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences, which properly would result from what was done." In the case then under consideration it was clear that if there had been a false statement of fact it had been knowingly made. Lord Cairns certainly could not have meant that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. All that he there pointed out was that in such a case motive was immaterial: that it mattered not that there was no design to mislead or defraud the public if a false representation were knowingly made. It was therefore but an affirmation of the law laid down in *Foster* v. *Charles*,[3] *Polhill* v. *Walter*,[4] and other cases I have already referred to.

I come now to very recent cases. In *Weir* v. *Bell* [5] Lord Bramwell vigorously criticised the expression "legal fraud,"

[1] 13 C. B., 777. [2] L. R., 6 H. L., 377, 409.
[3] 7 Bing., 105. [4] 3 B. & Ad., 114. [5] 3 Ex. D., 238.

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and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times at all events, the Judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

In the same case Cotton, L. J., stated the law in much the same way as he did in the present case, treating "recklessly" as equivalent to "without any reasonable ground for believing the statements made." But the same learned Judge in *Arkwright* v. *Newbold* [1] laid down the law somewhat differently for he said: "In an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." And his exposition of the law was substantially the same in *Edgington* v. *Fitzmaurice*.[2] In this latter case Bowen, L. J., defined what the plaintiff must prove in addition to the falsity of the statement, as "secondly that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false."

It only remains to notice the case of *Smith* v. *Chadwick*.[3] The late Master of the Rolls there said: "A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." This, like everything else that fell from that learned Judge, is worthy of respectful consideration. With the last sentence I quite agree, but I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie.

[1] 17 Ch. D., 301. [2] 29 Ch. D., 459. [3] 20 Ch. D., 27, at pp. 44 67

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It must be remembered that it was not requisite for Sir George Jessel in *Smith* v. *Chadwick* [1] to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms: "On the whole I have come to the conclusion that this, although in some respects inaccurate, and in some respects not altogether free from imputation or carelessness, was a fair, honest, and *bonâ fide* statement on the part of the defendants, and by no means exposes them to an action for deceit."

I may further note that in the same case, Lindley, L. J., said: "The plaintiff has to prove, first, that the misrepresentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the defendants, or at all events that they did not believe the truth of it." This appears to be a different statement of the law to that which I have just criticised, and one much more in accord with the prior decisions.

The case of *Smith* v. *Chadwick* [2] was carried to your Lordships' House.[3] Lord Selborne thus laid down the law: "I conceive that in an action of deceit it is the duty of the plaintiff to establish two things: *first*, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and *secondly*, he must establish that this fraud was an inducing cause to the contract." It will be noticed that the noble and learned Lord regards the proof of actual fraud as essential, all the other matters to which he refers are elements to be considered in determining whether such fraud has been established. Lord Blackburn indicated that although he nearly agreed with the Master of the Rolls, that learned Judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is

[1] 20 Ch. D., 27, at pp. 44, 67.

[2] 20 Ch. D., 27, 44, 67.

[3] 9 App. Cas. 187 (190).

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impossible to read his judgment in this case, or in that of *Brownlie* v. *Campbell*[1] without seeing that in his opinion proof of actual fraud or of a wilful deception was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusion to which I have been led. I think the authorities establish the following propositions: *First*, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. *Secondly*, fraud is proved when it is shewn that a false representation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. *Thirdly*, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley* v. *Freeman*[2] down to *Western Bank of Scotland* v. *Addie*[3] in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shewn that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir* v. *Bell*,[4] where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view, it is treated as established law. The *dictum* of the late Master of the Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would

[1] 5 App. Cas., 925.
[2] 2 Sm. L. C., 74.
[3] L. R., 1 H. L. Sc., 145.
[4] 3 Ex. D., 238.

sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed, Cotton, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor* v. *Ashton* [1] appears to me to be in direct conflict with the *dictum* of Sir George Jessel, and inconsistent with the view taken by the learned Judges in the Court below. I observe that Sir Frederick Pollock, in his able work on Torts (p. 243, note), referring, I presume to the *dicta* of Cotton, L. J., and Sir George Jessel, M. R., says that the actual decision in *Taylor* v. *Ashton* [1] is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie* v. *Campbell* [2] a very different thing from knowledge,

[1] 11 M. & W., 401. [2] 5 App. Cas., at p. 952.

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if I thought that a person making a false statement had shut his eyes to the facts, or purposely asbtained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they fraudulently represented that by the special Act of Parliament which the company had obtained they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts. Before considering whether the charge of fraud is proved, I may say that I approach the case of all the defendants, except Wilde, with the inclination to scrutinise their conduct with severity. They most improperly received sums of money from the promoters, and this unquestionably lays them open to the suspicion of being ready to put

before the public whatever was desired by those who were promoting the undertaking. But I think this must not be unduly pressed, and when I find that the statement impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion.

I must further remark that the learned Judge who tried the cause, and who tells us that he carefully watched the demeanour of the witnesses and scanned their evidence, came without hesitation to the conclusion that they were witnesses of truth, and that their evidence whatever may be its effect, might safely be relied on. An opinion so formed ought not to be differed from except on very clear grounds, and after carefully considering the evidence, I see no reason to dissent from Stirling J.'s conclusion. I shall therefore assume the truth of their testimony.

I agree with the Court below that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were but to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your Lordships must consider what were the circumstances. By the General Tramways Act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only.[1] In order, therefore, to enable the company to use steam power an Act of Parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the Board of Trade. It was therefore incorrect to say that the company had the right to use steam; they would only have that right if they obtained the consent of the Board of Trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting the plans to the Board of Trade, obtained a special Act empowering the use of steam. It might well be that the fact that the consent of the Board of Trade was necessary to dwell in the same way upon their minds, if they thought that the

[1] 33 & 34 Vict., c. 78, s. 34.

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consent of the Board would be obtained as a matter of course if its requirements were complied with, and that it was therefore, a mere question of expenditure and care. The provision might seem to them analogous to that contained in the General Tramways Act, and I believe in the Railways Act also, prohibiting the line being opened until it had been inspected by the Board of Trade and certified fit for traffic, which no one would regard as a condition limiting the rights to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn now to the evidence of the defendants. I will take first that of Mr. Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the Bar and a director of one of the London tramway companies. He states that he was aware that the consent of the Board of Trade was necessary, but that he thought that such consent had been practically given, inasmuch as pursuant to the Standing Orders, the plans had been laid before the Board of Trade with the statement that it was intended to use mechanical as well as horse-power, and no objection having been raised by the Board of Trade, and the Bill obtained, he took it for granted that no objection would be raised afterwards, provided the works were properly carried out. He considered, therefore, that, practically and substantially they had the right to use steam, and that the statement was perfectly true.

Mr. Pethick's evidence is to much the same effect. He thought the Board of Trade had no more right to refuse their consent than they would in the case of a railway; that they might have required additions or alterations, but that on any reasonable requirements being complied with they could not refuse their consent. It never entered his thoughts that after the Board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent.

Mr. Moore states that he was under the impression that the passage in the prospectus represented the effect of Sect. 35 of the Act, inasmuch as he understood that the consent was obtained. He so understood from the statements made at the board by the solicitors to the company, to the general effect that everything

was in order for the use of steam, that the Act had been obtained subject to the usual restrictions, and that they were starting as a tramway company, with full power to use steam as other companies were doing.

Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt about it. It never occurred to him to say anything about the consent of the Board of Trade, because as they had got the Act of Parliament for steam he presumed at once that they would get it.

Mr. Derry's evidence is somewhat confused, but I think the fair effect of it is that though he was aware that under the Act the consent of the Board of Trade was necessary, he thought that the company having obtained their Act the Board's consent would follow as a matter of course, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He believed at that time that it was correct to say they had the right to use steam.

As I have said, Stirling, J., gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established.

It is not unworthly of note that in his report to the Board of Trade, General Hutchinson, who was obviously aware of the provisions of the special Act, falls into the very same

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inaccuracy of language as is complained of in the defendants, for he says: "The Act of 1882 gives the company authority to use mechanical power over all their system."

I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test, with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true.

Adopting the language of Jessel, M. R., in *Smith* v. *Chadwick*,[1] I conclude by saying that on the whole I have come to the conclusion that the statement "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and *bonâ fide* statement on the part of the defendants, and by no means exposes them to an action for deceit."

I think the judgment of the Court of Appeal should be reversed.

Order of the Court of Appeal reversed; order of Sterling, J., restored; the respondent to pay to the appellants their costs below and in this House: cause remitted to the Chancery Division.

NOTE.

This decision of the House of Lords lays down an important principle in the law of fraud. When a person with a view to influence the conduct of another wilfully leads him into a false belief, and this other person acts accordingly to his injury, the act is said to be induced by fraud; and the former is liable to the latter in damages in an action for deceit. To constitute the fraud, it is not essential that the defendant was or expected

[1] 20 Ch. D., at 67.

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to be benefited by the deceit; but it is essential that he should have been guilty of wilful falsehood or at least reckless disregard of truth in the representation made. The rule in *Derry* v. *Peek*, may therefore be stated to be that a false statement is not actionable as a tort, unless it is wilfully false; mere negligence in the making of false statements is not actionable either as deceit or as any other kind of tort. The case was one in which the promoters of a company issued a prospectus containing a negligent misrepresentation as to the powers of the company, and in reliance on this statement, the plaintiff took shares in the company; the promoters were held not liable in damages on the ground that there was no proof that the error was fraudulent. The question remains however, when is a statement wilfully false? The test is the existence of a genuine belief in the truth of the statement. It is not necessary for liability that the defendant should have known it to be false; it is sufficient, if he did not genuinely and honestly believe it to be true; and in this connection it must be remembered that the ground upon which an alleged belief was founded is a most important test of its reality.

The rule in *Derry* v. *Peek* is subject to important exceptions; for instance, where there is a contractual duty of careful statement or where a person purporting to act as agent enters into an implied contract of warranty of authority (*Starkey* v. *Bank of England*, (1903) A.C. 114; *Dickson* v. *Reuter*, 3 C. P. D., 1). Nor does the rule affect the principle of estoppel by representation, *In re Bahia Co.*, L. R. 3 Q. B., 584. The action of deceit for the issue of a prospectus containing erroneous statements, where it lies, does lie only at the instance of a person to whom it is addressed and who is invited to subscribe for shares; it does not lie at the instance of a third person who has bought shares in the market and had them transferred to him. See *Peek* v. *Gurney* (Judgment of Lord Cairns), L. R., 6 H. L., 377.